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No. .....

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1988

—o—

DRUID HILLS CIVIC ASSOCIATION, INC., *et al.*,
Petitioners,

v.

THE FEDERAL HIGHWAY ADMINISTRATION, *et al.*,
Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

DAVID F. WALBERT
WALBERT & HERMANN
100 Peachtree Street
Suite 500
Atlanta, GA 30303
404/523-5000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act and the case or controversy requirement of Article III prohibit a federal court from reviving a prior case, at the request of an administrative agency, for the sole purpose of reviewing a new administrative decision of that agency where no aggrieved person has challenged the decision and there is no willing litigant to oppose the agency's position.

2. Whether plaintiffs may be denied a motion to voluntarily dismiss their complaint under Fed. R. Civ. P. 41(a)(2) where the opposing party would suffer no legal or other prejudice whatsoever if the motion were granted.

3. Whether a district court may, upon the filing of a motion for summary judgment by one party, simultaneously rule that the opposing party shall be allowed no discovery with regard to the motion, disregard entirely the opposing party's affidavit pursuant to Fed. R. Civ. P. 56(f), and, at the same time, enter summary judgment on the merits without affording the opposing party any opportunity to respond to the motion for summary judgment.

4. Whether plaintiffs are prevailing parties for costs and fees purposes in an action under the Administrative Procedure Act where they have successfully established that an administrative decision was insufficient and illegal so that, if the proposed administrative action were to ever go forward, a new administrative decision and record would be necessary.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Druid Hills Civic Association, Inc., Inman Park Restoration, Inc., Candler Park Neighborhood Organization, Caution, Inc., Jack Boozer, Phyllis Schwartz, John T. Juricek, Neil C. Moran, William E. McMurry, and Quinn Hudson. The corporate petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

The parties below also were respondents The Federal Highway Administration, United States Department of Transportation, R. A. Barnhart, D.J. Altobelli, Thomas D. Moreland, Georgia Department of Transportation, United States Environmental Protection Agency, Carl Jeter, and The United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit in this case is reported at 833 F.2d 1545 (11th Cir. 1987), and is reprinted in the appendix hereto, page A1, *infra* (*"DHCA II"*).

The opinion of the United States District Court for the Northern District of Georgia, on respondent's motion for summary judgment, is reported at 650 F.Supp. 1368 (N.D. Ga. 1986), and is printed in the appendix hereto, page A13, *infra* (*"DHCA II"*).

The 1985 opinion of the Court of Appeals for the Eleventh Circuit, reversing in part and affirming in part, is reported at 772 F.2d 700 (11th Cir. 1985), and is reprinted in the appendix hereto, page A32, *infra* (*"DHCA I"*).

The opinion of the United States District Court for the Northern District of Georgia entered on November 14, 1984, is not reported, but is reprinted in the appendix hereto, page A56, *infra* (*"DHCAI"*).

JURISDICTION

Petitioners seek review of a decision of the Eleventh Circuit rendered on December 16, 1987. On December 31, 1987, petitioners moved the court of appeals for rehearing and suggestion of rehearing in banc. These petitions were denied on February 19, 1988.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(The text of the following provisions is set forth in the appendix.)

1. Article III, Section 2 of the United States Constitution.
2. 5 U.S.C. § 702.
3. Federal Rule of Civil Procedure 41(a)(2).
4. 28 U.S.C. § 2412(a).

———o———

STATEMENT OF THE CASE

Proceedings Below

On September 21, 1984, the federal defendants approved funding for construction by the state defendants of a highway project known as the Presidential Parkway in Atlanta, Georgia. Plaintiffs filed their complaint on September 24, 1984, challenging defendants' decision on the basis of NEPA and section 4(f) of the Federal-Aid Highway Act, 49 U.S.C. § 303. After trial on October 22-25, 1984, the district court dismissed plaintiffs' complaint. On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that defendants' 4(f) decision was legally inadequate. *DHCA v. FHWA*, 772 F.2d 700 (11th Cir. 1985) (*DHCA I*). The district court then entered a final judgment, pursuant to Rule 58, apparently terminating the substantive litigation. A post-judgment motion for attorney's fees was filed by plaintiffs on January 13,

1986 for their successful challenge to the 1984 section 4(f) agency decision.

On April 25, 1986, FHWA issued a new section 4(f) decision based on an entirely new administrative record. The FHWA then filed a motion for "summary judgment" on June 6, 1986, asking the district court to review and uphold the new 1986 decision. On December 23, 1986, the district court granted defendants' motion for summary judgment and denied plaintiffs' request for attorney's fees for *DHCA I*. That decision was affirmed by the Eleventh Circuit on December 16, 1987. Petitioners' motion for rehearing and suggestion for rehearing en banc were denied on February 19, 1988.

Statement of Facts

The proposed highway would cut directly through the middle of Atlanta's several historic districts, and it would also destroy four City of Atlanta parks. Because the highway would cross parks and historic districts, it could not be built with federal funds without first complying with section 4(f), which strictly limits highway construction in park and historic areas. 49 U.S.C. § 303.

At the 1984 trial, plaintiffs introduced some 224 exhibits in their challenge to the legality of the highway under NEPA and 4(f), and some 30 witnesses testified live or by deposition. Plaintiffs showed, among other things, that the project was opposed by a host of government agencies and that every single local, state, and private agency or organization that had studied the desirability of constructing a highway in this location had rejected the suggestion before the proposal at issue in 1984 came for-

ward. Finally, plaintiffs offered evidence to show that the proposed Presidential Parkway was the *most* destructive alternative, in contravention of section 4(f)(2), and that the administrative record was intentionally distorted in order to exaggerate the need for the road and to understate its true 4(f) impact. The Eleventh Circuit agreed that defendants' 4(f) decision was legally insufficient:

> In summary, the case must be remanded to the Secretary for adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans. This review should encompass an accurate assessment of the characteristics of the property that will be affected by the alternative, e.g., if the property is in a historic district, whether it has been previously impacted by commercial development and if so, to what extent. The Secretary's review must also address the quantity of harm that will accrue to the park or historic site and the nature of that harm, e.g., visual impact or physical taking. 772 F.2d at 718-19.

After the defendants' administrative decision approving the project was set aside, the project was halted and the contracts cancelled. The defendants then faced a range of options. They could abandon construction of any highway; they could propose a different project in the same corridor; or they could again advocate the same project. A draft 4(f) decision opting again for the Presidential Parkway was released on December 22, 1985. (D. Ex. I-56) The draft was criticized by many citizens and the United States Department of the Interior. (D. Exs. I-87 to 98; I-108). These criticisms included the fact that defendants continued to ignore the requirements of section 4(f)(2) and falsely inflated adverse impacts when dealing with alternatives to the Presidential Parkway, while mini-

mizing similar harm when discussing the Presidential Parkway. The Interior Department concluded that the Presidential Parkway option had not been justified under section 4(f)(2). (D. Ex. I-108) The defendants adhered to their draft decision in a final decision dated April 25, 1986.

On June 6, 1986, the FHWA moved for "summary judgment" in connection with the 1986 administrative decision. Plaintiffs responded to the motion for summary judgment by asserting that the 1986 decision was in no way before the district court because final judgment had already been entered; that the complaint did not challenge the 1986 decision and had never been amended to raise any such challenge; and that the district court did not have jurisdiction to review administrative action solely upon the request of an agency where that action had not been challenged by an "aggrieved party". (R. 5-54-11; 5-61-1 to 11) In the event that the district court were to view the matter otherwise, plaintiffs alternatively moved for a voluntary dismissal of any portion of their 1984 complaint that might somehow be construed to challenge the 1986 administrative decision. (R. 5-56-1; 5-62-1)

If the court were to conclude that there was jurisdiction over the 1986 administrative decision, and yet refused to allow dismissal of that portion of plaintiffs' complaint, plaintiffs requested leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (R. 5-56-2) As a final alternative, if the court were to reject all of plaintiffs' requests, they asked the court to allow discovery prior to their filing a substantive response to the motion for summary judgment. (R. 5-56-2) Such discovery had been allowed in 1984 in connection with that administrative de-

cision (R. 2-14-1), but the local rules prohibited discovery without leave of court concerning the 1986 decision. N.D. Ga. Local Rule 225. An affidavit was also filed pursuant to Fed. R. Civ. P. 56(f) stating that discovery was necessary to respond to the merits of the motion. (R. 5-54-Ex. B)

In its December 23, 1986 order, the district court not only rejected every single one of plaintiffs' contentions and requests, including the request for discovery, but also reached the merits of the 4(f) decision and granted the motion for summary judgment. The court also denied plaintiffs attorney's fees for their successful challenge to the 1984 administrative decision. The court's decision was affirmed by the Eleventh Circuit, and it is that decision that petitioners seek review of now.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION THAT ALLOWS A FEDERAL COURT TO REVIVE A PRIOR CASE, SOLELY AT THE REQUEST OF AN ADMINISTRATIVE AGENCY, FOR THE PURPOSE OF REVIEWING A NEW ADMINISTRATIVE DECISION OF THAT AGENCY THAT HAS NOT BEEN CHALLENGED BY ANY AGGRIEVED PERSON, DISREGARDS THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III, THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT, AND PREVIOUS DECISIONS OF THIS AND OTHER COURTS.

After the Eleventh Circuit's 1985 ruling (*DHCA I*) in this case, the FHWA commenced a new administrative

proceeding. At that point in time, no one could know what might be the outcome of that proceeding. The court of appeals had held that the original decision did not satisfy section 4(f) because it did not adequately compare various alternatives to the proposed project. The court noted that "a tremendous task confront[ed] the Secretary in resolving these difficult issues. (*DHCA I* at 718)

Although it was entirely possible that a proper section 4(f) analysis would have led to an administrative decision disapproving the Presidential Parkway, the FHWA ultimately did opt again for construction of the Presidential Parkway in its new 1986 decision. However, the entire administrative record that underlies the 1986 decision document is completely distinct from what existed in 1984 and from what the plaintiffs put in issue in their 1984 complaint. No part of the 1984 administrative record is a part of the administrative record in the present case. 833 F.2d at 1548.

The administrative decision before the court in 1986 was an entirely new one, and one not challenged by the plaintiffs' 1984 complaint. Indeed, since the administrative decision that is now before this court did not even exist in 1984 when the complaint was filed, and since the present administrative record was a complete nullity at that time, it would have been impossible for the plaintiffs to have put the 1986 decision or administrative record at issue in their 1984 complaint. Moreover, section 4(f) is like most statutes that govern administrative decisions, in that it merely prohibits those decisions which do not have an adequate basis in the administrative record. None of the plaintiffs could have been an "aggrieved party" as to the new 1986 decision until at least April 25, 1986.

It is undisputed that plaintiffs never attempted to amend their complaint in any way to challenge the 1986 decision or the administrative record upon which it was based. To the contrary, as soon as the FHWA suggested that the 1986 administrative decision might somehow be brought before the district court for judicial "approval," plaintiffs expressed surprise and made it clear that they had no desire to amend their complaint to challenge the decision. They asserted instead that there was no case even pending before the court. (R. 5-54-1)

Notwithstanding the posture of this litigation in 1986, and notwithstanding the fact that the district court had entered a Rule 58 "final judgment" document on November 19, 1985 that seemingly terminated the court's jurisdiction over the substance of the case (App. G), the FHWA nevertheless went forward and filed a motion for summary judgment seeking approval of its new 1986 administrative decision. The action of the FHWA was highly unusual to say the least. This appears to be the first occasion in which a court has allowed an administrative agency to seek judicial review of its own decisions where no person has attempted to make any judicial challenge to that decision or the administrative record upon which it is based. The Eleventh Circuit's approval of the FHWA's action disregards the Administrative Procedure Act requirement that allows only "aggrieved persons" to challenge administrative actions with which they take issue. 5 U.S.C. § 702. Nothing in the APA authorizes an administrative agency to seek approval of its own actions in a non-adversarial proceeding against unwilling citizen-litigants. The court of appeals' holding also disregards the established precedent from this court and all other circuits that limits the

review of administrative actions to those cases where an aggrieved person has an actual case or controversy with the agency, and where that aggrieved person affirmatively seeks to challenge the agency decision at issue. See, e.g., *Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970); *Bender v. Clark,* 744 F.2d 1424, 1428 (10th Cir. 1984).

What is particularly improper about the FHWA's action here is that it sought the district court's imprimatur in a nonadversarial proceeding. Plaintiffs disclaimed any intention or desire to participate in the present litigation. While it is inherently inappropriate and outside the APA to allow an agency to seek judicial review of its own decision, it is that much more so where the agency seeks to do that in a proceeding against wholly unwilling parties. As the district court was advised by plaintiffs, one of the basic reasons plaintiffs did not intend to challenge the 1986 decision there was expense. (R. 12-40 to 44) Properly prosecuted, the cost of a full challenge to the 1986 decision would have been great, a fact the plaintiffs well knew from *DHCA I.* (R. 4-35-1) Plaintiffs also saw the present litigation as duplicative of future state court litigation that had become necessary before the legality of the project could be determined under state law. See *Georgia DOT v. City of Atlanta,* 255 Ga. 124, 335 S.E.2d 114 (1985).

The absence of any willing litigants to oppose the FHWA's effort to seek judicial review of its new 1986 decision is not a mere procedural flaw. It points up the very lack of a case or controversy in violation of Article III. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). In rejecting petitioners' claim that there was no case or controversy under Article III, the Eleventh Circuit's de-

cision ignores the realities of this case. Not only was there no willing opposing party to litigate against the FHWA in 1986, there was absolutely nothing that could possibly have been in controversy between the original litigants to this case after the Eleventh Circuit's first decision that set aside the FHWA's 1984 agency action. At least from the time when the Eleventh Circuit rendered its first decision in 1985 *(DHCA I)* until April 25, 1986 (when the FHWA rendered its new administrative decision), there was no action of the defendants in existence that the plaintiffs could have complained of. The highway contracts had been cancelled, and there was no existing agency decision that in any way approved the highway under section 4(f). There was nothing that the plaintiffs could have complained of, and there was nothing that made them "aggrieved parties." There simply was no dispute, case or controversy of any sort between the original parties.

The fact that there was no case or controversy during this period, which the FHWA's own counsel acknowledged in May 8, 1986 correspondence (R. 5-54-Ex. D), makes the ruling of the district court and Eleventh Circuit here non-sensical. If the lower courts were correct, it would mean that a case and controversy could exist at one point, completely cease to exist as an Article III case or controversy at another point, and then somehow rematerialize later on. If that were the law, that would not only create tremendous confusion in determining when a case ceased or was revived, it would squarely conflict with the basic rule that a case must continue as a real and active case or controversy during every stage of the proceedings or jurisdiction is lost. *Defunis v. Odegaard*, 416 U.S. 312 (1974).

The absence of a present case or controversy in 1986 is further underscored by the fact that the defendants have never tried to relet the project for contracts over the nearly four years that have elapsed since *DHCA I*. If there was any controversy in 1986, it was the kind of hypothetical one that fails to satisfy the Article III requirement that a controversy be concrete and real. Federal courts should not be in the business of assuming jurisdiction over possible future disputes, but that is precisely what occurred here.

II. THE ELEVENTH CIRCUIT'S DECISION THAT REFUSES TO ALLOW A PARTY TO VOLUNTARILY DISMISS A COMPLAINT, EVEN THOUGH DISMISSAL WOULD CAUSE THE OPPOSING PARTY NO LEGAL OR OTHER PREJUDICE WHATSOEVER, SERIOUSLY MISAPPLIES FED. R. CIV. P. 41(a)(2) AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In the event that the district court were to conclude that it not only had jurisdiction over any pending case and controversy, but that the plaintiffs' 1984 complaint had somehow anticipatorily challenged a then non-existent 1986 administrative decision, plaintiffs moved to voluntarily dismiss the complaint insofar as any portion of it might be so construed, pursuant to Rule 41 (a)(2). (R. 5-56-1) That motion should have been granted. *See Foman v. Davis*, 371 U.S. 178 (1962). It is not the business of the United States district courts to compel unwilling plaintiffs to litigate cases with government agencies, particularly where they never challenged the matter that is purportedly at issue.

The district court is not empowered to simply weigh "the equities" in deciding a motion to dismiss under Rule 41(a)(2). Rather, the party opposing the motion should first show clear and plain legal prejudice before the motion can be denied. *Durham v. Florida East Coast Railway Company*, 385 F.2d 366, 368 (5th Cir. 1967). In the present case, no such "legal prejudice" was possible. Indeed, the FHWA could not make such a showing because it has no right whatsoever to ever seek, much less insist upon, judicial review of its own actions.

In *Holiday Queen Land Corporation v. Baker*, 489 F.2d 1031 (5th Cir. 1974), the Fifth Circuit reversed the district court's denial of a motion to dismiss without prejudice, citing *Durham v. Florida East Coast Railway Company, supra*, and reiterated that the defendant must be legally prejudiced before a court can consider denying plaintiff's motion.

> Had the court entered a voluntary dismissal, [defendant] faced only the annoyance of a second litigation upon the same subject matter. Despite [defendant's] insistence that a second suit would be only a perpetuation of the frivolous and spurious, we conclude that [defendant] would not have lost any substantial right by the dismissal. *Id.* at 1032.

In *Holiday Queen*, unlike the present case, the plaintiff had affirmatively undertaken to litigate the matter that was before the court. After full discovery, it appeared at a pretrial conference that the plaintiff could prove no claim against one defendant. The motion to dismiss with regard to that one defendant was denied by the trial court, and, at trial, the court then entered judgment for the defendant in the absence of any evidence against it. The facts in *Holi-*

day Queen, which constituted an abuse of discretion, were mild by comparison to the present case. See also *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976).

The district court's opinion here provided no justification for denying plaintiffs' motion. The court merely stated: "The defendants have spent a great deal of time and money in preparing the new findings." In fact, defendants presented no evidence whatsoever concerning the "time and money" purportedly spent in connection with the "new findings." More importantly, whatever effort might actually have been expended in connection with the new decision is attributable directly to defendants' initial refusal to follow the law and nothing more.

The merits of the plaintiffs' motion to dismiss make the facts in any reported case under Rule 41(a)(2) pale by comparison. Here, plaintiffs never made any effort whatsoever to put the 1986 decision in issue. When it was first suggested that there might be a live case or controversy, and that the defendants wanted to interject the 1986 decision into this case, plaintiffs eschewed any desire to participate in such litigation. No discovery was had, and there was no trial. To the extent that the defendants were put to any time or expense in connection with the litigation here, it was entirely at their initiative and entirely in pursuit of their own tactical self-interest. In ruling on plaintiffs' motion, there was no fact or factor that weighed in defendants' favor, and denying the motion to dismiss was error.

Some of the other many court of appeals decisions concerning voluntary dismissal that contradict the Eleventh Circuit's holding include *Davis v. USX Corp.*, 819 F.2d 1270 (4th Cir. 1987); *Hamilton v. Firestone*, 679 F.2d

143 (9th Cir. 1982); *Puerto Rico v. Leith*, 668 F.2d 46 (1st Cir. 1981); *Hoffman v. Alside*, 596 F.2d 822, 823 (8th Cir. 1979). The Fourth Circuit's recent decision in *Davis v. USX Corp., supra,* is particularly pertinent since there had been a prior appeal in that case, just as occurred here, before the plaintiff sought to dismiss her complaint. While the Fourth Circuit held that the district court had abused its discretion in refusing dismissal in *Davis*, petitioners would note that there was far more justification for the district court's action in *Davis* than in the present case. *Davis* was an employment discrimination case where the subject matter of the initial complaint, and the first appeal, was still very much alive at the time of the second appeal. Here, by comparison, the 1986 administrative decision and record that the FHWA brought before the district court did not even exist when plaintiffs filed their complaint.

III. A DISTRICT COURT SHOULD NOT BE ALLOWED THE ARBITRARY POWER, WHEN ONE PARTY FILES A MOTION FOR SUMMARY JUDGMENT, TO SIMULTANEOUSLY RULE THAT THE OPPOSING PARTY SHALL BE ALLOWED NO DISCOVERY WITH REGARD TO THE MOTION, TO DISREGARD THE OPPOSING PARTY'S RULE 56(f) AFFIDAVIT, AND, AT THE SAME TIME, ENTER SUMMARY JUDGMENT ON THE MERITS WITHOUT FIRST AFFORDING THE OPPOSING PARTY AN OPPORTUNITY TO RESPOND TO THE MOTION.

A. The Lower Courts Wrongfully Refused to Permit Plaintiffs Any Discovery Whatsoever With Regard to the New 1986 Agency Decision and Administrative Record.

Because of the bizarre posture of the FHWA motion for summary judgment, plaintiffs had to request permis-

sion to pursue discovery before any could be taken. The four month discovery limitation imposed by the local rule from the date of answer had lapsed more than two years before. Notwithstanding the fact that the district court had allowed discovery during the challenge to the 1984 administrative decision, and notwithstanding the fact that the 1986 decision document and underlying record were entirely new and distinct, the district court inexplicably refused all discovery. In so doing, the court did not even purport to exercise its discretion or make any determination of whether discovery was warranted here or why it might be denied. The court simply rejected the request out of hand. Not only was the court's decision a failure to even exercise discretion, it ignored that fact that plaintiffs had filed an affidavit pursuant to Rule 56(f) stating that the motion could not be responded to properly without discovery. (R. 5-54-Ex. B; Ex. 72)

The action in the district court here is literally unprecedented. It is axiomatic that parties have a broad right to discovery. The Supreme Court first laid down this rule in *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947), where this court wrote "that the deposition-discovery rules are to be accorded a broad and liberal treatment." The court's refusal to allow any discovery in the face of counsel's affidavit pursuant to Rule 56(f) was extremely improper. All other circuits have held that a district court has discretion to "control and guide" discovery under Rule 56(f), but district courts are prohibited from preventing a party from discovery concerning the fundamental merits of the summary judgment motion. See, e.g., *Lowe's, Inc. v. Bays*, 209 F.2d 610, 615 (5th Cir. 1954). No other court has ever held that summary judgment is proper

without allowing a party any discovery concerning the merits of the motion.

Neither can discovery be denied in the face of a Rule 56(f) affidavit unless it is absolutely clear that the evidence sought is non-existent. *Visa International Service v. Bank Card Holders of America,* 784 F.2d 1472 (9th Cir. 1986); *Exxon Corp. v. FTC,* 663 F.2d 120 (D.C. Cir. 1980). At the very least, a district court must allow the party some limited discovery to determine whether there is a sufficient basis to allow the full range of discovery sought by the party to oppose a summary judgment motion. *Visa International Service v. Bank Card Holders, supra* at 1476.

In the cited cases, as in all other reported Rule 56(f) cases, the party has at least been allowed an opportunity for *some* discovery. The issue was whether *more* discovery should have been granted. No case as harsh as the present one has ever been reported, where a party was refused *all* discovery.

B. Even if the Court Could Have Done All That It Did and Disallowed All Discovery, It Was Error to Reach the Merits of the FHWA's Motion Without Allowing Plaintiffs An Opportunity to Respond on the Merits.

In response to FHWA's summary judgment motion, the plaintiffs filed extensive pleadings arguing that the district court had no jurisdiction; that there was no case or controversy pending; that the 1986 administrative decision had never been put in issue by complaint or counterclaim; and that, if the court concluded otherwise, it should either grant plaintiffs' motion to voluntarily dismiss their complaint in that respect or certify the court's jurisdictional decision for an interlocutory appeal. If the district

court were to refuse each and every one of those requests, plaintiffs filed an affidavit stating that the motion for summary judgment could not be responded to on the merits without discovery. If the court were empowered to deny all of these requests, including discovery, the court was surely without authority to enter summary judgment without allowing plaintiffs an opportunity to respond by brief on the merits of the 4(f) question to the extent that that could be done without discovery.

In essence, the district court entered judgment as if the plaintiffs were in default, and that was error. The drastic sanction of judgment is appropriate only where there has been "a clear record of delay or contumacious conduct by the plaintiff." *Silas v. Sears Roebuck & Company, Inc.*, 586 F.2d 382, 385 (5th Cir. 1978). By no stretch of the imagination could the plaintiffs be accused of such conduct here. To the contrary, plaintiffs did everything that should have been done to allow for the proper adjudication of the issues that were before the court and at every stage of the proceedings.

IV. PLAINTIFFS WERE PREVAILING PARTIES, FOR COSTS AND ATTORNEY'S FEES, IN DHCA I, BECAUSE THEY SUCCESSFULLY ESTABLISHED THAT DEFENDANTS' 4(f) ADMINISTRATIVE DECISION WAS INSUFFICIENT AND ILLEGAL, BECAUSE THE PROJECT WAS HALTED AS A RESULT OF DHCA I, AND BECAUSE THE PROJECT COULD NOT GO FORWARD ABSENT PREPARATION OF A NEW AND LEGALLY PROPER ADMINISTRATIVE RECORD AND DECISION.

Because plaintiffs were successful in *DHCA I* in establishing that defendants' section 4(f) decision was legally

inadequate, plaintiffs sought their costs and attorney's fees as "prevailing parties" pursuant to 28 U.S.C. §§ 1988 and 2412. The Eleventh Circuit characterized this achievement as a "mere procedural victory," and citing this court's decision in *Hanrahan v. Hampton,* 446 U.S. 754 (1980), denied attorney's fees on that basis. 833 F.2d at 1551. In holding that plaintiffs were not prevailing parties in *DHCA I,* the Eleventh Circuit disregarded the holdings of this court, other circuits, and the very nature of what a "prevailing party" is in administrative review litigation.

Plaintiffs' entire prayer for specific relief in their complaint requested that the court:

> Set aside as contrary to law and an abuse of discretion the defendants' approval of the project. (R. 31)

Injunctive relief was also requested in order to enforce the judicial decision that set aside the administrative decision, but as a practical matter no such relief ever needed to be requested. It was assumed that the defendants would comply with the *DHCA I* decision, and defendants did in fact properly do so and cancelled the contracts on the project. To this date, some three and one-half years later, no new contracts have been let.

Plaintiffs achieved all of the ultimate relief they possibly could have in this case because a decision approving the project was set aside. In an administrative review case, no more relief could have been won in the courts. The Eleventh Circuit's holding that the plaintiffs did not prevail because they only obtained a "mere procedural victory" would make it impossible for a party to recover costs and fees as a "prevailing party" in nearly every administrative review case.

In a case challenging the government's compliance with the law, the sole power vested in the courts is to pass on whether the decision at issue did or did not comply with the applicable substantive statutes. The court generally does not have the power to make an ultimate and final finding that a particular project cannot ever go forward, regardless of what future administrative proceedings might show. Since the only relief that is available from the courts is an order setting aside an administrative decision, parties who achieve such relief have achieved all that they can by litigation, and they are necessarily prevailing parties. See *Hensley v. Eckerhart,* 461 U.S. 424 (1983).

In the specific context of highway litigation, the exact same issue present here arose in *Citizens Council of Delaware County v. Brinegar,* 741 F.2d 584 (3rd Cir. 1984). Attorney's fees were awarded to the plaintiffs there in connection with their successful litigation setting aside, on the basis of section 4(f), an administrative decision to build a highway. The fact that the defendants could go back to the administrative process was irrelevant. Indeed, the defendants there did subsequently revise their administrative proceedings and again approved the project. (The district court upheld that later decision when it was affirmatively challenged by some of the same plaintiffs. See *Ashwood Manor Civic Association v. Dole,* 619 F.Supp. 52 (E.D. Pa. 1985).) See also *Sierra Club v. Army Corps of Engineers,* 776 F.2d 383, 393 (2nd Cir. 1985); *Save our Ecosystems v. Clark,* 747 F.2d 1240 (9th Cir. 1984); *Southern Oregon Citizens v. Clark,* 720 F.2d 1475 (9th Cir. 1983); *Environmental Defense Fund, Inc. v. Watt,* 554 F.Supp. 36 (E.D. N.Y. 1982), aff'd 722 F.2d 1081 (2nd

Cir. 1983) (awarding fees in NEPA and environmental cases where defendants could recommence the challenged activity upon compliance with the underlying substantive statutes at issue).

Plaintiffs could cite any number of decisions where much less relief was won but plaintiffs nevertheless "prevailed." Many of these cases involve situations where the plaintiff achieved none of the "ultimate objective" they may have desired, but the defendants were forced to comply with some procedural requirement of the law. Such cases include *Fast v. School District of City of Ladue,* 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc); *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 911 n. 25 (3rd Cir. 1985); *Bagby v. Beal,* 606 F.2d 411 (3rd Cir. 1979).

A recent case in the Ninth Circuit underscores just how far the Eleventh Circuit's opinion is from established precedent. *Guerrero v. Marsh,* 819 F.2d 238 (9th Cir. 1987). In *Guerrero,* the plaintiff was seeking a correction in his Army records, but the Army Board of Correction took no action on his request. The sole success that *Guerrero* achieved through litigation was to compel the Army to take some action on his request. Whether the plaintiff might ultimately get his records corrected as desired played no part in the Ninth Circuit's decision. Nevertheless, Guerrero's victory in ultimately compelling the Army to make some administrative decision on his request was sufficient to make him the prevailing party since he obtained all that he could in that case. "Guerrero has prevailed under the Equal Access to Justice Act, 28 U.S.C. § 2412." 819 F.2d at 242. Under the Eleventh

Circuit's reasoning in the present case, however, Guerrero would have obtained relief that would have been much closer to a "mere procedural victory" than the relief obtained by the plaintiffs here, and he would not have been a "prevailing party."

The Ninth Circuit recently followed *Guerrero* in another EAJA case, *Lear Siegler, Inc. v. Lehman,* 842 F.2d 1102, 1115-17 (9th Cir. 1988). There, the court held:

> Litigants who succeed in a claim to compel a defendant to comply procedurally with the law can be "prevailing parties" even if they do not win relief on their related substantive claim. *Id.* at 1116.

The Eleventh Circuit's construction of prevailing party is clearly incorrect, and it contradicts the decisions of this court and other circuits. Because the interpretation of "prevailing party" status for cost and fee awards is common to a tremendous amount of litigation throughout this country, this conflict between the circuits should be resolved.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the writ be granted and that this case be brought before the United States Supreme Court for review.

Respectfully submitted,

WALBERT & HERMANN

/s/ By: DAVID F. WALBERT

100 Peachtree Street
Suite 500
Atlanta, Georgia 30303
404/523-5000

APPENDIX A

DRUID HILLS CIVIC ASSOCIATION, INC., et al., Plaintiffs-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants-Appellees.

DRUID HILLS CIVIC ASSOCIATION, INC., et al., Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants,

National Trust for Historic Preservation in the United States, Appellant.

Nos. 87-8122, 87-8149.

United States Court of Appeals, Eleventh Circuit.

Dec. 16, 1987.

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HAND*, Chief District Judge.

HATCHETT, Circuit Judge:

The district court's ruling in this case requires that we apply the principles established in *Taylor v. Heckler,* 778 F.2d 674 (11th Cir.1985), and *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506 (11th Cir.1987) (in banc). Applying those principles, we affirm.

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* Honorable William Brevard Hand, Chief U.S. District Judge for the Southern District of Alabama, sitting by designation.

PROCEDURAL HISTORY

The federal appellees authorized funding for the state appellees to construct a project known as the Presidential Parkway in Atlanta, Georgia.[1] The parkway is a proposed 2.4 mile section of highway running east from the I-75/I-85 stub in downtown Atlanta, George, to Ponce de Leon Avenue, an east-west roadway that is part of the Olmsted Park network in Atlanta's Druid Hills historic district.

Several civic associations and residents of the affected area (collectively referred to as Druid Hills) challenged the project in the district court.[2] The district court dismissed Druid Hill's complaint ruling that the government had made adequate findings in its environmental impact statement (EIS). On appeal, we affirmed the district court's decision in part and reversed it in part. *Druid Hills Civic Association, Inc., et al. v. Federal Highway Administration, et al.*, 772 F.2d 700 (11th Cir.1985). We remanded the case to the district court for a further remand to the Secretary of Transportation, requiring the Secretary to make adequate findings under section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C.

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1. The appellees are: FHWA; USDOT; GDOT; EPA; R.A. Barnhart, the Administrator of the FHWA; D.J. Altobelli, Georgia State Division Director of the FHWA; Elizabeth Dole, Secretary of the USDOT; Thomas D. Moreland, Commissioner of the GDOT; and Carl Jeter, Regional Administrator of the EPA.

2. The appellants are: The Druid Hills Civic Association, Inc.; Inman Park Restoration, Inc.; Candler Park Neighborhood Organization; CAUTION, Inc.; various named individuals; and the National Trust for Historic Preservation.

§ 303 (1982).[3] Section 4(f)(1) requires that the Secretary find no feasible or prudent alternatives to the use of park lands and historic sites before approving such property for highway purposes.[4] Section 4(f)(2) requires the Secretary

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3. Our directions on remand were:

> In summary, the case must be remanded to the Secretary for adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans. This review should encompass an accurate assessment of the characteristics of the property that will be affected by the alternative, e.g., if the property is in a historic district, whether it has been previously impacted by commercial development and if so, to what extent. The Secretary's review must also address the quantity of harm that will accrue to the park or historic site and the nature of that harm, e.g., visual impact or physical taking. It will not suffice to simply state that an alternative route would affect 4(f) properties without providing some rational, documented basis for such a conclusion. In short, the same consideration must be given to whether these alternative routes would minimize harm to the section 4(f) properties as was accorded the adopted route.

772 F.2d at 718.

4. Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), was repealed in 1983 but was recodified without substantial change at 49 U.S.C. § 303.

Section 18 of the Federal-Aid Highway Act, 23 U.S.C. § 138, is virtually identical to section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. For purposes of this appeal, the statutes will be referred to collectively as "section 4(f)."

Section 4(f) states:

> (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
>
> (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and

(Continued on following page)

to utilize all possible planning to minimize harm to parks and historic sites before allowing a property to be used for highway purposes.

Following our remand, in further remanding the case to the Secretary, the district court adopted the mandate of this court. At that time, Druid Hills moved for attorney's fees.

Following remand to the Secretary, the Federal Highway Administration (FHWA) made additional findings and again determined that the project satisfied the requirements of section 4(f). The FHWA then filed in the district court a motion for summary judgment. The administrative record filed with the motion for summary judgment was developed entirely upon remand and did not include any part of the record developed in the original administrative proceedings. The district court granted FHWA's

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(Continued from previous page)

Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or propect includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303 (1982).

motion for summary judgment and denied Druid Hills's motion for attorney's fees, 650 F.Supp. 1368.

ISSUES

On appeal, Druid Hills contends that: (A) the district court lacked jurisdiction to entertain FHWA's motion for summary judgment; (B) the district court abused its discretion in denying Druid Hills's motion to voluntarily dismiss the complaint; (C) the district court abused its discretion in denying Druid Hills's request for discovery; and (D) the district court abused its discretion in denying Druid Hills attorney's fees and costs.

A. JURISDICTION

Druid Hills contends its complaint challenged only the original decision in the Draft and Final Environmental Impact Statements (DEIS and FEIS), which also served as the 4(f) decision document. The DEIS and FEIS did not become part of the administrative record considered by the Secretary upon remand for further findings under section 4(f). Druid Hills's complaint alleged that approval of the Presidential Parkway was in conflict with section 4(f), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-75, because certain hearings on the project had not been held. The district court originally ruled against Druid Hills on all issues raised, but this court remanded the case to the district court for further remand "to the Secretary for adequate findings of impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans." *Druid Hills,* 772 F.2d at 718. According to Druid Hills, since the 1984 complaint did not contemplate a challenge to the 1986 decision of the Secre-

tary on remand, the district court lacked jurisdiction to consider FHWA's motion for summary judgment seeking approval of the Secretary's 1986 decision. Druid Hills further contends that when the district court entered judgment adopting the remand order of the Eleventh Circuit, that judgment constituted a final judgment, effectively terminating the litigation and the district court's jurisdiction.

Had the district court originally determined the Secretary's 4(f) findings inadequate and remanded the case to the Secretary, clearly, the district court would have retained jurisdiction of the case until the proceedings on remand were concluded.

> This circuit treats *all* remand orders to the Secretary [of Health and Human Services] as interlocutory orders, not as final judgments. *See Howell v. Schweiker*, 699 F.2d 524 (11th Cir.1983); *Tookes v. Harris*, 614 F.2d 1296 (5th Cir.1980) (published as an appendix in *Howell*). In *Howell*, we held that the 'district court's [remand] . . . [does] not end the litigation' because the Secretary may thereafter grant or deny benefits to the claimant . . . [who] may obtain subsequent judicial review.[2]
>
> *Taylor v. Heckler*, 778 F.2d 674, 677 (11th Cir.1985) (emphasis in original).

The only distinction between *Taylor* and this case is that the district court remanded the case to the Secretary of Transportation because the Eleventh Circuit ordered

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[2] Because this circuit considers a remand order an interlocutory order, it follows by operation of law that the district court retains jurisdiction of the case until the proceedings on remand have been concluded. To terminate its jurisdiction, the district court must subsequently enter a dispositive order of some sort. . . .

it to do so. This is a distinction without a difference. Hence, the district court retained jurisdiction.

Druid Hills contends the district court's entry of judgment adopting this court's mandate after the first appeal constituted a final judgment under the separate document rule of Federal Rule of Civil Procedure 58. In support of this proposition, Druid Hills cites *United States v. Perez*, 736 F.2d 236 (5th Cir.1984). *Perez* held a district court's order adopting a magistrate's report and recommendation constituted a judgment under rule 58.

Neither *Perez* nor other cases cited by Druid Hills and amici curiae involved remand orders like the one in this case.[5] The purpose of the separate document rule is to provide a clear indication of when litigation is terminated. *In re Tidewater Group, Inc.*, 734 F.2d 794, 795-96 (11th Cir.1984). Because the purpose of a remand order is to continue litigation rather than terminite it, such orders cannot reasonably be construed as terminating litigation on the issues remanded.

Druid Hills further argues that its complaint merely sought a determination that the Secretary's original approval of the parkway did not satisfy section 4(f) requirements. Since the court of appeals agreed and remanded the case for further findings, Druid Hills asserts that it received all the relief it originally sought, thereby elim-

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5. We affirm the district court's denial of National Trust for Historic Preservation's motion to intervene in this lawsuit. We treat its briefs appealing (in Case No. 87-8149) the district court's denial of its motion to intervene as amicus briefs. Amicus curiae Carter Presidential Center also filed a brief in this case (No. 87-8122).

inating any case or controversy from the lawsuit and depriving the district court of article III jurisdiction.

When a party files a lawsuit it submits itself to the authority and rules governing that court. In general, these rules exist to further justice, not to help or hinder a particular party. *Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir.1987) (in banc). A party cannot couch its pleadings so as to unilaterally eliminate a rule governing the proceedings. In short, Druid Hills could not unilaterally deprive this court of its authority to remand the case to the Secretary for further findings. When Druid Hills filed its complaint it submitted itself to the authority of the federal court system. The fact that Druid Hills may have become satisfied at a given procedural stage in the litigation does not deprive the federal court system of article III jurisdiction. The existence of a case or controversy must be viewed in light of all the proceedings available to both litigants under the rules and authority of the federal court system. Were the rule otherwise, a party could state in its complaint that it seeks relief "only from the district court" and upon receiving a favorable judgment, avoid an appeal on the ground that no case or controversy exists because the complainant is satisfied with the district court's judgment. Although this court's reversal of the district court may have satisfied Druid Hills, it did not satisfy FHWA, et al. Either party may create or sustain a case or controversy. FHWA's motion for summary judgment, made following the Secretary's new 4(f) findings on remand, presented a case or controversy satisfying the district court's jurisdictional requirements. Accordingly, the district court re-

tained jurisdiction of this case after it remanded the case to the Secretary for further proceedings.

B. VOLUNTARY DISMISSAL

Druid Hills contends the district court abused its discretion in denying Druid Hill's motion to voluntarily dismiss the complaint. A district court does not abuse its discretion in granting a motion for voluntary dismissal unless the party opposing the motion "will suffer some plain legal prejudice *other than the mere prospect of a second law suit.* It is no bar to dismissal that [the movant] may obtain some tactical advantage thereby." *Durham v. Florida East Coast Railway Co.,* 385 F.2d 366, 368 (5th Cir.1967) (emphasis in original).

Had the district court granted Druid Hills's motion to voluntarily dismiss its complaint, then FHWA, et al. would effectively have suffered the legal detriment of being deprived of the court of appeals's order remanding the case to the Secretary for further proceedings. Where a party brings an appeal challenging the decision of a lower tribunal and the case is remanded for new proceedings, then the right to new proceedings belongs to both parties, not to either party individually. *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d at 1514 (11th Cir. 1987) (in banc).

In *Litman,* the defendant appealed a jury verdict awarding punitive damages to the plaintiff. On appeal, this court ordered a new trial solely on the issue of punitive damages. On remand, the defendant filed in district court a waiver of its right to a new trial, consenting to the jury's original punitive damage award. Accordingly, the

district court entered judgment for plaintiff in the amount of the punitive damages originally determined by the jury. That decision was itself appealed to the Eleventh Circuit, which heard the case in banc. The in banc court held: "Once the appellate ruling became final, the right to a new trial belonged to neither party individually but rather to both." *Litman,* 825 F.2d at 1514.

Therefore, when this court remanded this case to the Secretary for further findings, both appellants and appellees acquired a right to those proceedings. Since the district court retained jurisdiction of this case on remand, this court's remand order necessarily conferred upon both parties a right to have the case fully litigated in the district court after the administrative hearing. Had the district court granted Rruid Hills'smotion for voluntary dismissal, this would have deprived FHWA, et al. of their right to further proceedings in the district court. Since FHWA, et al. would have suffered plain legal prejudice had Druid Hills's complaint been dismissed, the district court did not abuse its discretion in denying Druid Hills's motion for voluntary dismissal.

C. DISCOVERY

Druid Hills also contends that the district court abused its discretion in denying the motion for discovery. By the requested discovery, Druid Hills sought to attack the motion for summary judgment. The district court denied discovery despite the affidavit of counsel for Druid Hills pursuant to rule 56(f) of the Federal Rules of Civil Precedure. That rule allows a court to permit "depositions to be taken or discovery to be had" to allow a party to oppose a motion for summary judgment. On the other hand,

FHWA contends that the affidavit of counsel for Druid Hills did not comply with rule 56(f) because the affidavit did not give reasons why Druid Hills could not "present by affidavit facts essential to justify [its] opposition." Fed.R.Civ.P.56(f).

FHWA filed its motion for summary judgment on June 6, 1986. After Druid Hills obtained an extension of time to respond to the motion, it filed a brief on August 20, 1986. That brief, however, did not respond substantively to the merits of the motion. Druid Hills also failed to take advantage of the district court's September 16, 1986, order allowing Druid Hills to file a brief in opposition to the motion. Druid Hills's apparent reluctance to make any serious substantive challenge to the motion, combined with the fact that it had the opportunity to conduct extensive discovery at the time of its original challenge to the approval of the Presidential Parkway, support the district court's determination that further discovery would not lead to the creation of a material question of fact. Therefore, the district court did not abuse its discretion in denying Druid Hills's motion for additional discovery.

D. ATTORNEY FEES

Under 42 U.S.C. §§ 1983 and 1988, a party is entitled to attorney's fees if it prevails on a significant legal issue, thereby achieving the primary relief sought. *B & J Music, Inc. v. McAuliffe*, 719 F.2d 1536, 1539 (11th Cir.1983). We read Druid Hills's complaint as seeking to prevent the construction of the Presidential Parkway. Druid Hills contends it merely sought a ruling that the FHWA's initial approval of the parkway did not comply with section 4(f). We interpret that, however, as a mere procedural victory.

Since we have not overturned the district court's granting of FHWA's motion for summary judgment, Druid Hills has not ultimately achieved the primary relief sought and is therefore not entitled to attorney's fees. *Hanrahan v. Hampton,* 446 U.S. 754, 757-58, 100 S.Ct. 1987, 1989-90, 64 L.Ed.2d 670 (1980); *Doe v. Busbee,* 684 F.2d 1375, 1380 (11th Cir.1982).

We find no error in the district court's denial of National Trust for Historical Preservation's motion to intervene.

Druid Hills's claim that the case should be remanded for reassignment to a different district judge is moot.

The judgments of the district court are affirmed in both cases.

AFFIRMED.

APPENDIX B

DRUID HILLS CIVIC ASSOCIATION, INC., et al.

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.

Civ. No. C-84-1931-A.

United States District Court, N.D. Georgia,

Atlanta Division.

Dec. 28, 1986.

ORDER

O'KELLEY, District Judge.

Presently before the court are plaintiffs' motion for attorneys' fees, costs, and expenses; federal defendants' motion for summary judgment and plaintiffs' conditional motion for voluntary dismissal as to the subject matter of federal defendants' motion for summary judgment; and plaintiffs' motion to allow filing of amendment to and clarification of plaintiffs' brief in support of plaintiffs' application for fees, costs, and expenses.

FACTS

Plaintiffs filed their complaint in this case on September 28, 1984. The complaint challenged the May 22, 1984 administrative decision approving the construction of the Presidential Parkway under section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 (1982), and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1982), and on other

grounds that are no longer relevant. The complaint requested both declaratory and injunctive relief. This court consolidated the application for preliminary injunction with the trial on the merits. The trial was held October 22-25, 1984. By order dated November 14, 1984, this court denied both plaintiffs' motion to enjoin construction of the Parkway and for an injunction pending appeal.

Plaintiffs' appealed this decision to the Eleventh Circuit Court of Appeals. On September 16, 1985, the Eleventh Circuit rendered its opinion affirming this court's decision in most respects. *Druid Hills Civic Association v. Federal Highway Administration,* 772 F.2d 700 (11th Cir. 1985). The Eleventh Circuit found, however, that this court erred in finding that the defendants section 4(f)(2) decisions concerning the Decatur Parkway and the two Moreland Avenue plans were adequate because the Eleventh Circuit found that the EIS did not provide the predicate facts on which to make a reasoned judgment. The Eleventh Circuit remanded this case for the Secretary of Transportation to make adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans. *Id.* at 718-19. By order of November 15, 1985, the mandate of the Eleventh Circuit was made the judgment of this court.

On January 13, 1986, Plaintiffs filed a motion for an award of attorneys' fees, costs, and expenses. Plaintiffs' basis for this motion is that plaintiffs were the prevailing party in this action pursuant to the decision and judgment of the Eleventh Circuit.

After remand the state and federal defendants undertook additional analysis and made additional findings as

described in the *Addendum.* (A.R. II-11). After complying with the administrative procedures, the Secretary of Transportation on April 25, 1986, determined that there was no prudent and feasible alternative to the construction of the Presidential Parkway and that the project includes all possible planning to minimize harm. On June 6, 1986, the federal defendants filed this motion for summary judgment asking the court to determine the adequacy of the federal defendants' findings pursuant to 49 U.S.C. § 303 (1982).

DISCUSSION

I. *Federal Defendants' Motion for Summary Judgment.*

A. *Whether Defendants' Motion for Summary Judgment is Properly Before this Court?*

Plaintiffs contend that the Federal Highway Administration's (FHWA) motion for summary judgment asks this court to approve the agency's administrative decision in an advisory opinion. It is plaintiffs' position that the new administrative decision made by defendants in April has never been challenged by the complaint in this case, and therefore, there can be no basis for an action in this case.

Whether defendants motion for summary judgment is properly before the court depends primarily on whether by adopting the mandate of the Eleventh Circuit, which remanded this case for the Secretary of Transportation for additional fact-finding, this court has entered a final judgment. The court finds that this issue is controlled by *Taylor v. Heckler,* 778 F.2d 674 (11th Cir.1985) and this court's adoption of the Eleventh Circuit mandate does not constitute a final judgment.

Taylor involved a remand by a district court to an administrative agency. In *Taylor* the Eleventh Circuit said "[t]his circuit treats *all* remand orders to the Secretary as interlocutory orders, not as final judgments." *Id.* at 677 (emphasis in original) (citing *Howell v. Schweiker,* 699 F.2d 524 (11th Cir.1983); *Tookes v. Harris,* 614 F.2d 1296 (5th Cir.1980)). This court can find no authority for treating a remand to the Secretary of Health and Human Services differently than a remand to the Secretary of Transportation.

Having decided that the adoption of the Eleventh Circuit's mandate does not constitute a final judgment, the court will next consider plaintiffs' contention that there is no case or controversy before the court and any decision on federal defendants' motion for summary judgment would constitute an advisory opinion. A controversy must be definite and concrete touching the legal relations of parties having adverse legal interests. *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 239, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937). The plaintiffs claim that there is no case or controversy because they do not challenge the recent 4(f) findings but only the 4(f) findings made by defendants in 1984.

By reversing a judgment of the district court, the appellate court voids the lower court's findings. *Atlantic Coast Line Railroad v. Saint Joe Paper Co.,* 216 F.2d 832 (5th Cir.1954), *cert. denied,* 348 U.S. 963, 75 S.Ct. 522, 99 L.Ed. 7510 (1955). In this case the Eleventh Circuit voided this court's decision that the Secretary of Transportation had made adequate 4(f) findings with regard to the Decatur Parkland and Moreland Avenue plans. For this reason, the court finds that the 4(f) issue first raised in the complaint still exists concerning the three alternatives

about which the court of appeals reversed and remanded to this court. The 1986 findings supplement the 1984 findings that the court of appeals determined were not adequate.

B. *Plaintiffs' Alternative Motion for Voluntary Dismissal.*

If an answer or a motion for summary judgment has been served, plaintiff's right to dismiss by simply giving notice ends. In this case the defendants have refused to stipulate to dismissal; therefore, plaintiff must have the permission of the court to dismiss. Fed.R.Civ.P. 41(a).

The purpose of rule 41(a)(2) is to prevent voluntary dismissal that may unfairly affect the other side. For this reason, courts have generally allowed dismissals unless the defendants will suffer some legal prejudice other than a second lawsuit. *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366 (5th Cir.1967); 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2364 (1971).

In this case the court finds that dismissal at this stage would result in prejudice to the defendants. This case has been in litigation for more than two years. The defendants have spent a great deal of time and money in preparing the new findings. Accordingly, the equities in this case fall in favor of denying plaintiffs' motion for voluntary dismissal.

C. *Plaintiffs' Request for Interlocutory Appeal.*

Plaintiffs request that, if this court finds that there is a case or controversy before the court and that plaintiffs' voluntary motion to dismiss should be denied, the

court allow plaintiffs to file an interlocutory appeal from such decisions pursuant to 28 U.S.C. § 1292(b).

There are three prerequisites set forth in 28 U.S.C. § 1292(b) that must be met before a court should allow an interlocutory appeal: (1) the appeal must concern a controlling question of law; (2) there must be a substantial ground for difference of opinion about this controlling question of law; and (3) the appeal must materially advance the ultimate determination of the litigation.

With regard to plaintiffs' motion for voluntary dismissal, generally matters that are within the court's discretion are not matters about which a court should grant an interlocutory appeal. *See Allen v. Mississippi Commission of Law Enforcement,* 424 F.2d 285 (5th Cir.1970). Although whether there is a case or controversy before this court concerns a controlling question of law, there is clear precedent in this circuit for this court's position. The court finds that allowing plaintiff to file an interlocutory appeal on these issues would result only in undue delay. Accordingly, plaintiff's request to file an interlocutory appeal is denied.

D. *Plaintiffs' Request for a Grant of a Ninety-Day Discovery Period.* L

When a case has been reversed and remanded, the district court has discretion concerning whether any additional discovery should be permitted. The question before the court on federal defendant's motion for summary judgment is whether the administrative record upon which the defendants relied in making their decision is adequate to support their findings. The same administrative record

that the defendants relied upon is before this court. Consequently, the court does not find that additional discovery would aid the resolution of this question. The court, therefore, denies plaintiffs' request for an additional ninety-day discovery period.

E. *Merits of Federal Defendants' Summary Judgment Motion.*

After careful review of the record the court grants federal defendants' motion for summary judgment.[1] " 'The summary judgment procedure is particularly appropriate in cases in which the court is asked to review . . . a decision of a federal administrative agency.' " *Florida Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1459 (11th Cir. 1985) (quoting 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure, Civil 2d* § 2733 (1983)); *Holley v. Seminole County School District*, 755 F.2d 1492, 1499-1500 n. 5 (11th Cir.1985). Summary judgment is particularly appropriate in cases such as this one because the court considers the same record that was before the agency when making its decision. *Citizens to Preserve Overton*

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1. On July 7, 1986, plaintiffs filed their response to defendants' motion for summary judgment. In that response, plaintiffs addressed the preliminary questions discussed *supra* in this order but did not address the merits of defendants' summary judgment motion. By order of September 16, 1986, the court granted plaintiff until September 22, 1986 to file a brief addressing the merits of defendants' motion and set a hearing on these motions for October 17, 1986. Plaintiffs did not file their brief within the designated time nor have they filed a brief since that time.

   In addition to the pleadings filed concerning the defendants' motion for summary judgment, the court also reviewed the exhibits attached to those pleadings in determining the merits of this motion.

Park v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971); *Brock*, 771 F.2d at 1459; *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1378 (11th Cir. 1983).

The court of appeals remanded this case to the Secretary of Transportation "for adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and Moreland Avenue plans." *Druid Hills*, 772 F.2d at 718. The court further directed the Secretary that

> [t]his review should encompass an accurate assessment of the characteristics of the property that will be affected by the alternative, e.g., if the property is in a historic district, whether it has been previously impacted by commercial development and if so, to what extent. The Secretary's review must also address the quantity of harm that will accrue to the park or historic site and the nature of that harm, e.g., visual impact or physical taking. It will not suffice to simply state that an alternative route would affect 4(f) properties without providing some rational, documented basis for such a conclusion. In short, the same consideration must be given to whether these alternative routes would minimize harm to the section 4(f) properties as was accorded the adopted route.

Id.

Pursuant to these directives, the state and federal defendants undertook additional analysis and made additional findings to comply with the Eleventh Circuit's mandate. On April 25, 1986, after reviewing the *Addendum*, the administrative record and all comments about their new findings, the federal defendants determined that there was no prudent and feasible alternative to the construction of the Presidential Parkway and that the project includes all possible planning to minimize harm. The court finds

that the federal defendants' decision complies with the court of appeals' directives.

The Supreme Court set forth the standard of review of the Secretary's decisions concering section 4(f) properties in *Overton Park*. The reviewing court must conduct a three part inquiry. First, the court must determine whether the Secretary properly acted within the socpe of her authority. When deciding this, the court must determine whether the Secretary properly construed her authority to approve the use of 4(f) properties only when there were no other feasible and prudent alternatives, and whether the Secretary could have reasonably believed that no such alternatives exist. Second, the court must inquire whether the Secretary's decision was arbitrary, capricious or an abuse of discretion, that is, whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. Third, the court must determine whether the Secretary's actions followed the requisite procedural requirements. *Overton Park,* 401 U.S. at 415-17, 91 S.Ct. at 823-24; *Druid Hills,* 772 F.2d at 714.

(1) *Whether the Secretary Acted Properly Within the Scope of Her Authority.*

The Secretary's section 4(f) determinations filed with this court substantiates that the Secretary properly construed her authority with respect to section 4(f). In section II of the determinations the federal defendants set forth the relevant inquiries demanded by the Supreme Court's decision in *Overton Park* and the Eleventh Circuit's decision remanding this case to the Secretary. The

4(f) determinations comply strictly with the guidelines set forth in these cases. For this reason, the court is satisfied that the Secretary properly construed her authority to use 4(f) properties only when there were no other feasible and prudent alternatives.

The court also finds that the Secretary could have reasonably believed that no such alternatives existed. The defendants undertook additional analysis of the three alternatives for which the case was remanded for further findings. Further investigation of the Marbut I plan revealed that by making certain changes in that plan, the plan would not require the use of any section 4(f) land.

An alternative that does not require the use of section 4(f) land must be evaluated under section 4(f)(1) which requires that the Secretary must approve such an alternative unless it is shown that the alternative is not feasible or prudent. "An alternative is feasible if it can be built as a matter of sound engineering. . . . An alternative is prudent unless there are "truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes,' or the alternative routes present 'unique problems.' " *Druid Hills,* 772 F.2d at 715 (quoting *Overton Park,* 401 U.S. at 411, 413, 91 S.Ct. at 821, 822).

Federal defendants determined that Marbut I was imprudent because it failed to meet the needs of the project and adversely impacted air quality. In analyzing Marbut I, the defendants made the following findings:

> The already severe congestion at Ponce de Leon Avenue and Moreland Avenue/Briarcliff Road and other

> area intersections would worsen. Safety on Ponce de Leon Avenue would be improved to the west of Moreland Avenue but worsen to the east. Therefore, there is a shift of the safety problem but not a solution. Filter through traffic diverting around the bottleneck at Ponce de Leon Avenue and Moreland Avenue/Briarcliff Road would be increased. This results in a contination or worsening of the problem. When viewing the already unacceptable safety and congestion problems, this alternative does the worst job of addressing the project transportation need.

(A.R. II-14 at 19-20.) The defendants also found that the Marbut I alternative would probably violate National Ambient Air Quality Standards (NAAQS) for carbon monoxide at the Ponce de Leon Avenue and Moreland Avenue/Briarcliff Road intersection. There are residences in close proximity to this intersection. For this reason, the defendants found that the potential exists for adverse public health effects. Thus, it was reasonable for the Secretary to find that there was no alternative to the use of 4(f) properties since the only alternative not using 4(f) properties failed to meet the transportation needs of the project and adversely impacted air quality in the project area.

(2) *Whether the Secretary's Decision was Arbitrary, Capricious or an Abuse of Discretion.*

The court must next determine whether the decision to build the Presidential Parkway rather than another alternative using section 4(f) property is based upon consideration of relevant factors and whether there has been

a clear error judgment. Alternatives using 4(f) properties are analyzed under section 4(f)(2). That section requires a balancing process that totals the harm caused by each alternate route to section 4(f) areas and selects the option that does the least harm. *Druid Hills*, 772 F.2d at 716 (citing *Louisiana Environmental Society, Inc. v. Coleman (LES. II)*, 537 F.2d 79, 85-86 (5th Cir.1976)).

The federal defendants undertook extensive analysis of the quality and quantity of the section 4(f) properties.[2] (A.R. II-14 at 30-62). The following is a summary of the defendants' findings: the federal defendants determined that the Olmstead Park and Parkways are the primary historic properties effected by the alternatives. The defendants found that all three alternatives use more land from the Olmstead Park and Parkways than does the Presidential Parkway. (A.R. II-14 at 59.) Additionally, the defendants found that the Decatur Parkway alternative would require the use of twelve contributing structures from within the Candler Park Historic District and two contributing structures from the Moreland Historic District. The Decatur Parkway was found to have substantial impacts on the Sycamore Historic District. (*Id.* at 59-61.) The defendants found that the Moreland Avenue Termination Alternate would require land use from Atkins Park, which would require the relocation of certain contributing gates and walls. (*Id.*) The defendants found that in addition to the Marbut II alternative having a greater impact on the Olmstead Park and Parkways than would the Presidential Parkway, Marbut II would also require the

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2. This analysis is summarized in the text of the section 4(f) determination. (A.R. II-14 at 30-62).

use of certain contributing structures within the Druid Hills Historic District. (*Id.*)

In contrast, the defendants found that the Presidential Parkway would not require the use of any structures from within any historic district. (*Id.*) The Presidential Parkway will not require the use of any land or structures from the Atkins Park Historic District. Although the Presidential Parkway was found to require more land from the Druid Hills Historic District (excluding the Olmstead Park and Parkways) than would the three alternates, the defendants found that the Presidential Parkway did not require the use of contributing structures or landscape within the Druid Hills Historic District.

The court is satisfied after its review of the defendants' analysis that the defendants' decision was based on relevant factors. "The only relevant factor in making a determination whether an alternative route minimizes harm is the quantum of harm to the park or historic site caused by the alternative." *Driud Hills,* 772 F.2d at 716. Only after a route harming parks or historic sites is determined to be the one that minimizes harm does the Secretary have to decide whether the route is feasible and prudent.

In the defendants' analysis, the defendants accurately assessed the characteristics of the 4(f) property effected by the alternatives and also reviewed the quantity of harm that will accrue to the park or historic site and the nature of that harm. *Id.* at 718; A.R. II-14 at 21-62. The administrative record contains sufficient information to enable the Secretary to weigh the damage to the protected properties under each alternative. Thus, it is clear that the

defendants thoroughly considered whether these alternative routes would minimize harm to the section 4(f) properties. After completing their thorough analysis, defendants concluded that the Presidential Parkway would result in less harm to parks and historic sites than the alternatives to the Parkway.

There is no evidence that the defendants' decision was a clear error in judgment. When reviewing the defendants' decision this court must only determine whether the Secretary has articulated "a rational connection between the facts found and the choice made." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962)). The Secretary's decision is entitled to a presumption of regularity, but this presumption does not shield the decision from a thorough review. *Overton Park,* 401 U.S. at 415, 91 S.Ct. at 823. The court, however, must give deference to agency officials when deciding matters within their area of expertise and not substitute the court's judgment for that of the agency. *National Wildlife Federation v. Marsh,* 721 F.2d. 767, 780 (11th Cir.1983). Federal defendants have clearly shown a rational connection between the harm caused by the different alternatives and their decision to build the Presidential Parkway. The court finds that the defendants' decision to build the Presidential Parkway is not arbitrary, capricious, or an abuse of discretion because it was based upon relevant factors and there is no evidence that defendants' decision reflects a clear error of judgment.

(3) *Whether Federal Defendants' Actions Followed the Necessary Procedural Requirements.*

The final inquiry that the court should make when reviewing a decision of the Secretary of Transportation is whether the Secretary's action followed the necessary procedural requirements. *Overton Park,* 401 U.S. at 417. The plaintiffs did not challenge the Secretary's compliance with section 4(f) procedural requirements in their complaint. *See Druid Hills,* 772 F.2d at 714-15. As was discussed in subsection IA of this order, the 4(f) issue first raised in the complaint still exists concerning the three alternatives about which this case was remanded for Secretary to make further findings. Although it appears that the federal defendants have followed the necessary procedural requirements, it is not necessary for the court to address this issue since the plaintiffs have never challenged defendants' procedural compliance. [3]

The court finds that as a matter of law the defendants' supplemental 4(f) findings regarding the Decatur Parkway and two Moreland Avenue plans satisfy the three requirements established by the Court in *Overton Park* for reviewing the Secretary's decisions regarding 4(f) properties. The court also finds that the defendants have complied with the Eleventh Circuit's decision in *Druid Hills Civic Association v. Federal Highway Administration,* 772 F.2d 700 (11th Cir.1985). The court finds that

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3. A review of the administrative record clearly shows that defendants have complied with the necessary procedural requirements. Plaintiffs have not brought defendants compliance into question on this motion for summary judgment by submitting any evidence to contest compliance as is required by Federal Rule of Civil Procedure 56(e).

there is no genuine issue as to any material fact remaining in this case. Accordingly, the court grants defendants' motion for summary judgment. *Celotex Corp. v. Catrett,* — U.S. —, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R. Civ.P. 56(c).

II. *Plaintiffs' Motion for Attorneys Fees, Costs and Expenses.*

Plaintiffs have moved for attorneys fees pursuant to 42 U.S.C. § 1988 against the state defendants and 28 U.S.C. § 2412 against the federal defendants. The basis for plaintiffs' motion is that they were the prevailing parties in connection with the phase of litigation which culminated when the Eleventh Circuit affirmed in part, reversed in part, and remanded to the Secretary of Transportation the prior decision of this court in this case. *Druid Hills Civic Association v. Federal Highway Administration,* 772 F.2d 700 (11th Cir.1985).

A party may be awarded attorneys fees if he has prevailed on the merits of at least some of his claims. *Hanrahan v. Hampton,* 446 U.S. 754, 758, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980). "For only in that event has there been a determination of the 'substantial rights of the parties,' which Congress deemed was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Id.* In a recent Eleventh Circuit opinion, the court said that "[t]he prevailing party test is 'whether he or she has received substantially the relief requested or has been successful on the central issue' . . . or stated another way, whether 'plaintiff's lawsuit was a catalyst motivating de-

fendants to provide the primary relief sought in a manner desired by litigation.' " *Martin v. Heckler,* 773 F.2d 1145, 1149 (11th Cir.1985) (citations omitted).

In plaintiffs' complaint, the plaintiffs sought to: (1) temporarily restrain, and preliminarily and permanently enjoin defendants from taking any actions toward the construction of the project; (2) set aside as contrary to law and as an abuse of discretion the defendants' approval of the project; (3) award plaintiffs their costs, expenses, and attorneys fees; and (4) further relief as may be appropriate and just. The relief that the plaintiffs contend they received from the Eleventh Circuit when that court remanded the case to the Secretary of Transportation is that the defendants' approval of the project was in part set aside as contrary to law and an abuse of discretion.

In the court of appeals' decision, the court remanded the case for the Secretary of Transportation to make "adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans." *Druid Hills,* 772 F.2d at 718. The reason the court remanded the case was that it determined the reasonableness of the defendants' conclusions concerning these alternates could not be determined from the EIS statement submitted to the courts. *Id.* The court of appeals did not find that the Secretary acted arbitrarily, capriciously, or abused her discretion in making her 4(f) findings. Although the plaintiffs were successful in delaying progress on the Parkway pending the defendants new 4(f) findings, this court cannot find that plaintiffs received any of the relief they requested in their complaint.

The plaintiffs rely primarily on two Ninth Circuit cases to support their position on this issue. *Save Our Ecosystems v. Clark,* 747 F.2d 1240 (9th Cir.1984); *Southern Oregon Citizens v. Clark,* 720 F.2d 1475 (9th Cir.1983). This case is distinguishable from those cases, however, because in those cases the plaintiffs had obtained the relief requested as to certain issues. In this case the plaintiffs did not achieve significant success on any of the issues or obtain any of the relief they sought. *See Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1982). For these reasons, plaintiffs' application for fees, costs, and expenses is denied.

III. *Plaintiffs' Motion to Amend Their Brief in Support of Their Motion for Fees, Costs, and Expenses.*

The plaintiff filed a motion on August 18, 1986 requesting the court to allow the plaintiff to file an amendment to their brief in support of plaintiffs' application for fees, costs and expenses. The plaintiff explained that the reason they needed to file an additional brief was that plaintiffs wished to make a brief point concerning federal defendants liability under 28 U.S.C. § 2412(b). In plaintiffs' motion they said their support for the argument they wished to make in the requested brief was the recent decision in *Savage v. Toan,* 636 F.Supp. 156 (W.D.Mo.1986). The court reviewed this case when considering plaintiff's motion for attorneys fees. Because the court found that plaintiffs were not prevailing parties on any issues in this case, there was no reason for the court to reach the further requirements set forth in 28 U.S.C. § 2412(b). The *Salvage* decision did not deal with the preliminary issue

of whether plaintiffs were prevailing parties on any issues. Since the court is disposing of this motion without reaching the further requirements of section 2412 that were discussed in *Savage*, there is no reason for the plaintiffs to file a supplemental brief. For that reason, plaintiffs' motion to file a supplemental brief is denied as moot.

CONCLUSION

The court grants federal defendants' motion for summary judgment. The court denies plaintiffs' motion for attorneys' fees, costs and expenses. The court also denies as moot plaintiffs' motion to file a supplemental brief.

APPENDIX C

DRUID HILLS CIVIC ASSOCIATION, INC., et al., Plaintiffs-Appellants,

v.

The FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants-Appellees.

No. 84-8894

United States Court of Appeals
Eleventh Circuit.

Sept. 16, 1985.

Before HENDERSON and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

HENDERSON, Circuit Judge:

Druid Hills Civic Association, Inc., *et al.*, in No. 84-8894 and National Trust For Historic Preservation in the United States in No. 84-8924 appeal the November 14, 1984 order of the United States District Court for the Northern District of Georgia denying their motions to enjoin construction of the Presidential Parkway (Parkway), a proposed 2.4 mile highway running east from the I-75/I-85 stub in downtown Atlanta to Ponce de leon Avenue, an east-west arterial that is part of the Olmsted Park network in Atlanta's Druid Hills Historic District. On appeal, the appellants contend that the district court erred in finding that the named appellees complied with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1982), section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C.

§ 303 (1982),[1] and section 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1982).[2]

FACTS AND HISTORICAL BACKGROUND[3]

For a better understanding of the current litigation, it is necessary to detail the history of the tract comprising

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1. Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), was repealed in 1983 but was recodified without substantial change at 49 U.S.C. § 303.

2. Section 18 of the Federal-Aid Highway Act, 23 U.S.C. § 138, is virtually identical to section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. For purposes of this appeal, the statutes will be referred to collectively as "section 4(f)."

   Section 4(f) states:

   (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

   (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

   (c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

   (1) there is no prudent and feasible alternative to using that land; and

   (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

   49 U.S.C. § 303 (1982).

3. This section is taken substantially from the district court opinion and from the purpose and need section of the environmental impact statement.

the proposed Parkway. In the late 1960s and early 1970s, the Georgia Department of Transportation (GDOT) acquired approximately 219 acres as right-of-way for two multi-lane highways, one oriented north-south (I-485) and one extending east-west (Stone Mountain Tollway). The land, known locally as the Great Park, was cleared of dwellings and other structures and has been vacant ever since. In 1971, the United States District Court for the Northern District of Georgia enjoined construction of I-485 pending completion of an environmental impact statement (EIS) by the GDOT and the Federal Highway Administration (FHWA).[4] The GDOT prepared an EIS which was approved by the FHWA. The Secretary of the United States Department of Transportation (USDOT) nevertheless rejected the EIS in 1973 because it did not satisfy the requirements of section 4(f).

As a result of strong opposition to the Stone Mountain Tollway, Governor Jimmy Carter appointed a commission to examine the project and make recommendations. The commission recommended against building the Tollway until an assessment could be made on the effect of the impending construction of the MARTA[5] east rail line. Governor Carter accepted the commission's recommendation in December, 1972.

In 1973, the City of Atlanta withdrew its support for I-485 and the Atlanta Regional Commission (ARC) deleted the project from its Regional Transportation Plan

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4. *Morningside-Lenox Park Association, Inc. v. Volpe*, 334 F. Supp. 132 (N.D.Ga. 1971).

5. The Metropolitan Atlanta Rapid Transit Authority.

in 1974. The State Transportation Board removed I-485 from the interstate highway system plan in 1974, which action was approved by the FHWA in 1975. In 1977, the GDOT began to dispose of all I-485 properties north of St. Charles Avenue but retained all the right-of-way south of that point for future transportation improvements in the east-west corridor.

Over the succeeding years, numerous alternatives for the use of the Great Park were developed. In 1974, Atlanta Mayor Maynard Jackson proposed the "Great Park" concept, a plan that included a variety of recreational and cultural facilities. In 1975, the City of Atlanta retained Arkhora Associates to prepare a reuse planning study for the Great Park. Arkhora's conceptual plan advocated a passive open space consisting of recreation areas, cultural facilities and housing. To meet transportation needs, the Arkhora proposal recommended that the I-75/I-75 stub be connected to DeKalb Avenue. The GDOT opposed the recommended action because it did not use the existing right-of-way to meet transportation needs and thereby failed to address the legal consequences of using the land for a non-transportation purpose. In 1977, the ARC adopted the Decatur Parkway Connector and Decatur Parkway, a road connecting the I-75/I-85 stub to an improved DeKalb Avenue, as part of its Regional Transportation Plan.

Atlanta Great Park Planning, Inc. (AGPP), a public nonprofit corporation, was formed in 1975 to study and plan for reuse of the property. AGPP's board of directors included representatives of ten neighborhoods, the Cities of Atlanta and Decatur, DeKalb County and the State of

Georgia. A report published in 1977 acknowledged that the Great Park could serve not only as a major recreational area but also as a stimulus for economic development and cultural revitalization but withheld recommendation pending further study. In 1978, AGPP retained H. Randall Roark to study housing opportunities in the right-of-way. In addition to its housing proposals, Roark's study, published in 1979, adopted the transportation, open space and economic development recommendations contained in the Arkhora plan and the AGPP's 1977 report. The GDOT did not support the Roark plan for the same reasons that it opposed the earlier Arkhora proposal.

In 1978, the GDOT retained Evan L. Marbut and Associates, Inc. to prepare a park and road development project for the area. The Marbut Plan consisted of four-lane north-south and east-west roadways through the existing right-of-way, with the east-west road terminating at Moreland Avenue. Remaining right-of-way was to be developed as a park. The GDOT approved the plan, but the City of Atlanta and AGPP opposed it because it was excessively oriented to transportation.

John C. Portman, Jr. developed a land use plan for the Great Park in 1979 at the request of Governor George Busbee. Alan M. Voorhees & Associates, a transportation planning firm retained by Portman, recommended that the I-75/I-85 stub be connected to DeKalb Avenue by way of a tunnel. The plan also called for housing units and cultural, recreational and open space uses, including the proposed Carter Presidential Library.

In 1980, the Georgia General Assembly created the Great Park Authority to examine the various proposals and

to develop a master plan for use of the property. The Great Park Authority retained Howard, Needles, Tammen & Bergendoff for transportation advice. The authority report presented to the 1981 General Assembly incorporated the firm's recommendation that the I-75/I-85 stub be connected to DeKalb Avenue along one of three proposed connecting routes and also included a park and housing facilities. The General Assembly took no specific action on this proposition.

The current design came into existence in the early 1980s. After leaving office in 1981, President Jimmy Carter began to formulate plans for a presidential library, museum and policy center (the Complex). President Carter regarded the Great Park property as an ideal location for the Complex because of its proxiimty to the central business district and metropolitan Atlanta universities, its relative seclusion and its accessibility to the interstate highway network.

In 1981, Andrew Young sought election as mayor of Atlanta. He ran in part on a platform of opposition to any roadway through the Great Park. After his election, Mayor Young reversed his position and in 1982 supported the so-called Mayor's Plan, the basic proposal sought to be enjoined in this litigation. The Mayor's Plan includes the Jimmy Carter Complex, a thirty-acre park surrounding the Complex, and a 2.4 mile highway consisting of a pair of two-lane roadways, one eastbound and one westbound, which circumscribe the Complex and park. In addition, the City of Atlanta is developing a housing plan for use of the remaining acreage. The Complex and roadside park would be located on existing right-of-way but

further land acquisition would be necessary to build the highway.

Throughout the first half of 1982, the Mayor's office presented the plan to the Great Park Authority, the ARC, various neighborhood organizations, neighborhoods and concerned citizens. On July 6, 1982, the Atlanta City Council approved the Parkway plan by a vote of ten to nine. The plan was then analyzed by the ARC to determine if it should become part of the Regional Transportation Plan. In September, 1982, the ARC voted to amend its Regional Transportation Plan by replacing the proposed Decatur Parkway Connector and the Decatur Parkway with the Presidential Parkway. The ARC nonetheless acknowledged that the Decatur Parkway provided better traffic distribution by encouraging alternative routing.

In August, 1982, the FHWA placed a notice of intent to prepare an EIS in the *Federal Register*. On April 21, 1983, the FHWA, the lead agency for the Parkway project, signed the draft EIS. Approximately 1,000 copies of the draft statement were distributed to agencies, organizations and individuals. The draft EIS allocated four pages to a discussion of the building of the Parkway, but only two sentences to the alternative of not building it. Other alternatives, including previous plans for the area, a road extending only to the Presidential library, a road terminating at Moreland Avenue, intersection improvements on existing streets, a two-lane Parkway and traffic improvements in the Ponce de Leon Avenue/Scott Boulevard corridor were discussed in four pages of text. Additional discussion of alternatives, including the proposed Decatur Parkway, was incorporated into the sec-

tion addressing impacts on properties protected by section 4(f).

The GDOT and the FHWA conducted three informal public information meetings between May 31 and June 2, 1983 in neighborhoods adjacent to the project. Court reporters were available to transcribe comments. A fourth public information meeting was held at the Atlanta Civic Center on June 7, 1983. A public hearing consisting of a formal presentation followed by a public comment session was held later that evening. Court reporters were available in the lobby and in the auditorium to receive oral and written comments. Approximately 1,500 to 3,000 people attended the hearing.

Several federal agencies commented on the draft EIS, including the Department of the Interior (DOI), the Environmental Protection Agency (EPA), the General Services Administration and the USDOT. DOI first recommended that the final EIS give consideration to whether the proposed Parkway would meet transportation needs. The comments noted that it was not clear that termination of the Parkway at Ponce de Leon Avenue, an east-west arterial, would substantially relieve traffic congestion and provide for future transportation needs in the east-west corridor. In addition, the DOI stated that discussion of alternatives in the draft EIS was inadequate and recommended that the final statement contain a more extensive discourse of the no-build and Moreland Avenue termination alternatives. Given these deficiencies, the DOI felt that the draft EIS failed to adequately address section 4(f) considerations. The EPA found that the draft statement did not adequately evaluate the impact on air quality.

The USDOT took the position that the draft EIS adequately addressed the effects of the project and measures to minimize harm. The department's comments further stated, however, that the draft EIS did not contain sufficient information to support a determination that there was no feasible and prudent alternative to the use of lands protected by section 4(f). Furthermore, the draft statement did not demonstrate a need for the Parkway as opposed to improvements to existing facilities. Therefore, the USDOT suggested a more thorough investigation of the Decatur Parkway alternative. The department concluded that it appeared that the proposed project would aggravate, rather than alleviate, traffic conditions on Ponce de Leon Avenue. The FHWA and the GDOT held meetings with various agencies to evaluate their comments.

On August 4, 1983, ten days after the expiration of the period for comment on the draft EIS, the GDOT made the decision to proceed with preparation of the final EIS around the build, i.e., Parkway, option. The GDOT and FHWA also began preparation of a Preliminary Case Report (PCR) pursuant to section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f, and 36 C.F.R. § 800 to evaluate the impact of the project on historic and archaeological resources. The PCR was forwarded to the Georgia Department of Natural Resources on October 25, 1983 and to the United States Advisory Council on Historic Preservation (ACHP) on November 3, 1983. Copies of the PCR were made available to the public for comment.[6]

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6. The PCR is included as Volume II of the final EIS.

After a review of this preliminary report, the ACHP recommended that the GDOT and FHWA give further consideration to the Moreland Avenue termination alternative in conjunction with other transportation improvements. FHWA responded that the Moreland Avenue alternative and others had been adequately considered but were not feasible or prudent. The chairman of the ACHP referred the matter to the full Council for consideration at a public hearing in Atlanta on February 27, 1984. Council members heard from witnesses and made an on-site inspection of the property. By a twelve to four vote, the Council recommended that the Parkway not be built but that the Carter Complex should be constructed on the site. The Council's written findings, forwarded to the Secretary of the USDOT on March 13, 1984, were largely critical of the stated need for the project and the attempt to link the Parkway and the Complex. The FHWA responded to the comments on April 17, 1984.

On May 22, 1984, the FHWA approved the final EIS. Copies of the statement were distributed to interested parties and notice of the approval was published in the *Federal Register*. In addition to alternatives raised in the draft EIS, the final EIS discussed MARTA, a light rail proposal, one-way pairings of streets, staggered work hours, and toll charges and provided a more detailed discussion of the Decatur Parkway alternative.

The DOI, EPA, individuals and organizations submitted comments on the final EIS. The DOI decided that the statement did not adequately respond to the department's comments on the draft EIS and was not respon-

sive to the requirements of section 4(f). Accordingly, the department objected to section 4(f) approval of the project.

On June 25, 1984, the chairman of the ACHP filed a formal notice of referral with the Council on Environmental Quality (CEQ). The CEQ solicited written comments from the public on the national importance of the Parkway and held a public meeting on July 17, 1984. On September 20, 1984, the CEQ determined that the proposed Parkway was not of national importance and declined to further review the project. The CEQ requested the FHWA to resume its normal decisionmaking process. On September 21, 1984, the FHWA, acting through William Van Luchene, the designee of the Secretary of the USDOT, approved and executed a record of decision.

These actions for declaratory and injunctive relief were initiated on September 24 and September 28, 1984.[7] Carter Library, Inc., the entity responsible for developing the Carter Complex, obtained title to the 3.2 acres on which the Complex would be built via a landswap with the GDOT on October 2, 1984. Construction commenced the same day.

The district court consolidated the applications for preliminary injunction with the trial on the merits. The

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7. The plaintiffs included the Druid Hills Civic Association, Inc.; Inman Park Restoration, Inc.; Candler Park Neighborhood Organization; CAUTION, Inc.; various named individuals; and the National Trust for Historic Preservation.

   The named defendants were the FHWA; US-DOT; GDOT; EPA; R.A. Barnhart, the Administrator of the FHWA; D.J. Altobelli, Georgia State Division Director of the FHWA; Elizabeth Dole, Secretary of the USDOT; Thomas D. Moreland, Commissioner of the GDOT; and Carl Jeter, Regional Administrator of the EPA.

trial was held October 22-25, 1984. By order dated November 14, 1984, the district court denied the motion to enjoin construction of the Parkway. The appeal was ordered expedited by this court. Both the district court and a panel of this court denied the appellants' motions for injunction pending appeal.

* * *

II. *Section 4(f)*

A. *Standard of Review*

Section 4(f) evidences Congress' response to growing public concern over the preservation of our nation's parklands, recreation areas, wildlife and waterfowl refuges, and historic sites (also referred to as section 4(f) properties). In enacting this section, Congress determined that section 4(f) properties should be accorded paramount consideration in connection with all federally financed transportation projects. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 412-13, 91 S.Ct. 814, 821-22, 28 L.Ed.2d 136, 151 (1971). Thus, the Secretary of Transportation[16] can approve a federal highway project requiring the use of parklands or historic sites only if (1) no feasible and prudent alternative to the use of the land exists, and (2) the project includes all possible planning to minimize harm to the property. 49 U.S.C. § 303; 23 U.S.C. § 138.

The Supreme Court enunciated the standard of judicial review of the Secretary's section 4(f) determination in *Overton Park.* While the Secretary's decision is entitled

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16. William R. Van Luchene, acting as the Secretary of Transporation's designee, made the final determination to proceed with the Parkway project. For the sake of convenience, we use the term "Secretary" throughout this section.

to a presumption of regularity, that presumption does not "shield his action from a thorough, probing, in-depth review." 401 U.S. at 415, 91 S.Ct. at 823, 28 L.Ed.2d at 153. A reviewing court must first consider whether the Secretary acted within the scope of her authority. Under this facet of the review, the court must determine whether the Secretary properly construed her authority to approve the use of section 4(f) property as limited to situations where there are no feasible and prudent alternatives, and whether the Secretary could have reasonably believed that no such alternatives exist. *Id.* at 415-16, 91 S.Ct. at 823, 28 L.Ed.2d at 153. The court must next determine whether the Secretary's ultimate decision was arbitrary, capricious or an abuse of discretion. This assessment requires an evaluation of whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416, 91 S.Ct. at 823-24, 28 L.Ed. 2d at 153. Although the judicial inquiry should be penetrating, the court is not empowered to substitute its judgment for that of the Secretary. *Id.* at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. The third and final inquiry is whether the Secretary's action followed the necessary procedural requirements. *Id.* at 417, 91 S.Ct. at 824, 28 L.Ed.2d at 154.

In reviewing the district court's decision affirming the Secretary's section 4(f) action, " 'the focal point for judicial review should be the administrative record already in existence [on the basis of which the administrator's determination was made], not some new record made initially in the reviewing court.' " *Louisiana Environmental Society, Inc. v. Dole.*, 707 F.2d 116, 119 (5th Cir.1983) (LES III) (quoting *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973)). Since the

appellate court applies the same standard of review as the district court, we need accord no particular deference to the district court's conclusions as to whether the administrative record supports the Secretary's decision. *Id.* If the record fails to show a sufficient basis for the administrative decision, the 4(f) determination must be overturned. The

> reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995, 1999 (1947).

B. *Analysis*

The plaintiffs-appellants object to the district court's findings that the Secretary reasonably complied with the requirements of section 4(f). They do not voice any objections to the Secretary's compliance with procedural requirements. Rather, they first claim that the state and federal defendants violated section 4(f)(1) because there was no reasonable basis for the conclusion that there exists no feasible and prudent alternative to the use of parks and historic sites. Specifically, they assert that the appellees failed to examine several feasible and prudent alternatives that would avoid harm to section 4(f) areas and improperly rejected other alternatives. Second, the appellants

contend that the agencies failed to incorporate all possible planning to minimize harm to protected areas as mandated by section 4(f)(2).

(1) *Section 4(f)(1)*

Section 4(f)(1) requires a finding of no feasible or prudent alternatives to the use of parklands and historic sites before the Secretary can approve the use of such property for highway purposes. An alternate route that also impacts upon parks and historic sites is not an "alternative to the use" of such property. *Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 85 (5th Cir.1976) (*LES II*). Thus, in making the section 4(f)(1) assessment, the Secretary is concerned with those alternatives that do not also impact on parks and historic sites.

The Supreme Court defined "feasible" and "prudent" in *Overton Park*. An alternative is feasible if it can be built as a matter of sound engineering. 401 U.S. at 411, 91 S.Ct. at 821, 28 L.Ed.2d at 150. An alternative is prudent unless there are "truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reache[d] extraordinary magnitudes," or the alternative routes present "unique problems." *Id.* at 413, 91 S.Ct. at 822, 28 L.Ed.2d at 151.

The section 4(f) statement contained in the EIS[17] discussed five alternatives to the Parkway project: the no-build option, the Decatur Parkway, two plans for roads terminating at Moreland Avenue and widening of Ponce de

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17. The Preliminary Case Report, included as Volume II of the final EIS, also addresses alternatives to avoid the project's impact on historic properties. The information contained in the PCR essentially duplicates that found in the EIS.

Leon Avenue with improved signalization. Of these, the no-build option is the only alternative to the use of section 4(f) areas because the other proposals contemplated the "use" of parklands and/or historic districts to some degree. *LES II*, 537 F.2d at 85. The district court examined the consequences of not building the highway and found that the Secretary could reasonably have concluded that the no-build option was not prudent because it failed to meet the need which the project was designed to address and because it might have resulted in loss of the Carter Complex or reduction in its scope.

Despite protestations to the contrary, the district court properly interpreted *LES II* to provide support for its conclusion that the Secretary could reasonably have rejected the no-build option as imprudent for failure to fulfill the need for a highway in Atlanta's east-west corridor. In *LES II*, the former Fifth Circuit Court of Appeals held that the Secretary could reasonably have determined that two alternatives, one of them the no-build option, were imprudent because they did not serve the project's purpose. *Id.* The appellants' reliance on the recent decision in *Stop H-3 Association v. Dole*, 740 F.2d 1442 (9th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2344, 85 L.Ed.2d 859 (1985), in an attempt to cast doubt on the correctness of the district court's determination ignores clear precedent binding on this circuit.[18] Accordingly, since the no-build alternative

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18. The district court in *Dole* found that rejection of the no-build alternative was reasonable because the need for the road had been sufficiently established. *Stop H-3 Association v. Lewis*, 538 F.Supp. 149, 180 (D.Hawaii 1982). In a footnote to its discussion of the no-build option, the Ninth Circuit Court of Appeals said:

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could reasonably have been found imprudent, we affirm this portion of the district court's order.[19]

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> The mere fact that a 'need' for a highway has been 'established' does not prove that not to build the highway would be 'imprudent' under *Overton Park*. To the contrary, it must be shown that the implications of not building the highway pose an 'unusual situation,' are 'truly unusual factors,' or represent cost or community disruption reaching 'extraordinary magnitudes.'

740 F.2d at 1455 n. 21 (citing *Overton Park*, 401 U.S. at 411-13, 91 S.Ct. at 821-22, 28 L.Ed.2d at 150-51). This footnote appeared in a portion of the opinion joined by only two judges. Judge Wallace, who did not concur in the majority's analysis of the no-build alternative, was of the opinion that a project-wide no-build option did not provide a prudent alternative to a highway for purposes of the section 4(f) analysis because section 4(f) deals with the *manner* of building the project rather than *whether* to undertake it in the first place. *Id.* at 1466-68 (emphasis added).

Even were we to agree that *Stop H-3 Association* offers a view more consistent with *Overton Park*, we would still be bound by our decision in *LES II*. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc). Only this court sitting en banc or the United States Supreme Court can overrule precedent binding on this court. *Julius v. Johnson*, 755 F.2d 1403, 1404 (11th Cir.1985) (per curiam).

19. The district court concluded that loss of the Complex could constitute a truly unique or unusual factor. The continued with the statement, "Thus, even if No-Build were prudent, the magnitude and uniqueness of the Carter Complex could justify an exception to the prudent requirement."

Given our disposition of the section 4(f)(l) claim, it is not necessary that we determine whether possible loss of the Complex or reduction in its scope is enough to render the no-build option imprudent. Indeed, it is not certain that such an occurrence would come to pass. *See* Final EIS, Vol. I, at 85 ("There would also be a possibility that the no-build might include a presidential library and policy center at or near its presently proposed location."). We do note, how-

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(2) *Section 4(f)(2)*

Section 4(f)(2) imposes the duty to utilize all possible planning to minimize harm to parks and historic sites before the Secretary can approve a route using section 4(f) property. Relocation of the highway through another portion of the section 4(f) area or through other section 4(f) properties must be considered as a means of minimizing harm. *LES II*, 537 F.2d at 85. As explained by the court in *LES II*, section 4(f)(2) requires a simple balancing process which totals the harm caused by each alternate route to section 4(f) areas and selects the option which does the least harm. *Id.* at 85-86. The only relevant factor in making a determination whether an alternative route minimizes harm is the quantum of harm to the park or historic site caused by the alternative. Considerations that might make the route imprudent, e.g., failure to satisfy the project's purpose, are simply not relevant to this determination. *Id.* at 86. If the route does not minimize harm, it need not be selected. The Secretary is free to choose among alternatives which cause substantially equal damage to parks or historic sites. *Id.*

The court in *LES II* made it clear that the Secretary does not have to accept an alternate route which causes less harm to parks and historic sites. Rather, the court construed section 4(f)(2) to mean that the route must also

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ever, that Congress enacted no exceptions to the requirement that there be no prudent alternatives to the use of parks and historic sites before the Secretary can approve a project using protected properties. As such, possible loss of the Complex would be a factor to consider in determining whether no-build was imprudent, not an event warranting an exception to the prudence requirement.

be feasible and prudent. Thus, a route that does minimize harm can still be rejected if it is infeasible or imprudent. The determination whether the route is infeasible or imprudent is based on factors other than the route's impact on section 4(f) areas. *Id.*

Applying this legal standard to the proposed Decatur Parkway, Moreland Avenue and Ponce de Leon Avenue alternatives, the district court found that the Secretary's determination that the alternatives either did not minimize harm or were imprudent was reasonable. As pointed out above, section 4(f)(2) requires the Secretary to utilize a balancing process that totals the harm caused by each alternative so that an option can be selected which does the least harm. *Id.* at 85-86. From this it is evident that the administrative record must contain adequate information to enable the Secretary to weigh the relative damage to protected properties which would result from building each of these roads. The record here is replete with references to the preferred route's impact on section 4(f) properties and to the efforts to minimize this harm. By comparison, the generalized and often contradictory attention directed to the section 4(f) impacts associated with the Decatur Parkway and Moreland Avenue routes is significantly deficient and is examined, for the most part, under the feasible and prudent standard. With the present record, it is difficult to see how the Secretary could have made the proper evaluation mandated by section 4(f)(2) of the harm caused by each of these options. A meaningful balancing of the damage done by the preferred route with that caused by the alternatives was therefore impossible. Accordingly, we are unable to review the correctness of the district court's findings as to the Decatur Parkway and

Moreland Avenue plans because we conclude that the Secretary did not make the requisite findings necessary for an informed comparison of the relative harms anticipated by the construction of the various routes. It is the deficiency in this "testing" process that afflicts the integrity of the EIS. *Id.* at 86.[20]

The GDOT and the FHWA concluded that their five-lane version of the Decatur Parkway was not a feasible and prudent alternative because it would have used land from one or more historic districts, would have cost more than the preferred alternative, would have destroyed residences and businesses, and would have impacted an archaeological site and rapid transit facilities. Final EIS, Vol. I, at 199. The EIS generally describes the various historic sites which would be affected, either by acquisition of right-of-way or visually, and represents that a number of structures would have to be removed. The EIS also states, however, that many of these areas were physically and visually impacted by construction of MARTA's east

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20. It is not entirely clear whether the Secretary rejected the various alternatives because they failed to minimize harm or because they were imprudent. The EIS states that the various alternatives are not feasible and prudent but then proceeds to list reasons that largely relate to the alternatives' impacts on parks and historic sites. As cautioned by the court in *LES II*, a route that minimizes harm may be rejected as imprudent only for reasons other than its impact on 4(f) properties. 537 F.2d at 86. On the remand, the Secretary must furnish a more specific analysis of the impact on 4(f) areas occasioned by the various alternatives. If this review results in the conclusion that the harm caused by an alternative is substantially equal to that caused by the preferred route, the Secretary is free to choose among the routes. If the alternative does minimize harm, however, it can be rejected as imprudent only for truly unusual reasons other than its impact on parks and historic sites.

rail line. *Id.* at 196. Indeed, with respect to possible effects on the Sycamore Street Historic District, the EIS states that "[b]oth the boundary and the eligibility of the district would need reevaluation before effects could be determined realistically." *Id.* at 197. In discussing the effect on the archaeological site, the EIS states that, according to procedures mandated by section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, a finding of no adverse impact could be anticipated. Moreover, measures to mitigate harm to the site were taken following evaluative testing. *Id.* at 198. This candid, albeit too limited, discussion of the characteristics of the property that would be taken by construction of the Decatur Parkway, when coupled with the lack of specificity about the quantity of the affected area, convinces us that the Secretary has not conformed to the requirement that all possible planning to minimize harm be accomplished before the Secretary chooses a route impacting on 4(f) areas.[21]

The EIS discussed two road plans which would terminate at Moreland Avenue. The first, known as the Marbut Plan, consists of an east-west roadway terminating at Moreland Avenue with a related north-south road on existing right-of-way. The plan calls for a future extension eastward to Lullwater Road. The second proposal, which we will refer to as the Moreland Avenue Plan, entails con-

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21. The district court found that the Secretary could reasonably have rejected the Decatur Parkway as imprudent because it did not fulfill transportation needs in the east-west corridor. Under the proper section 4(f)(2) analysis, a conclusion that an alternative was imprudent could prevent its acceptance even if it was less harmful. If we followed the district court's reasoning, there would be no need for further inquiry into the minimization of harm issue.

struction of an east-west road ending at Moreland Avenue and the widening of Moreland and Ponce de Leon Avenue between Moreland and Clifton Road. The district court found that the Secretary could reasonably have determined that neither of the plans would minimize harm to section 4(f) areas and that the Moreland Avenue Plan was also imprudent because it did not fulfill the need for a road.

Again, we cannot evaluate the reasonableness of these conclusions because the EIS does not provide the predicate facts on which to make a reasoned judgment. Although discussion of the Marbut Plan's effect on parks and historic sites is lacking in substance, it would provide a more adequate basis for a finding that an alternative did not minimize harm than would the comments concerning the impact of the Moreland Avenue Plan.[22] The EIS acknowledges that the Moreland Avenue Plan would cause the same disruption as the Presidential Parkway up to its termination at Moreland. *Id.* at 204. The comments concerning this route's additional effects on historic sites bordering Moreland and Ponce de Leon Avenues are largely conclusory, however. For instance, the EIS states that widening of Moreland Avenue would adversely affect the North Highland/North Avenue Historic District but there is no mention of the type of impact, the characteristics of the property or the degree of harm that will accrue to the historic area.

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22. Our task of determining whether there was compliance with section 4(f) was made all the more difficult by the fact that consideration of the two Moreland Avenue plans was merged into one section with little to differentiate what discussion related to which plan.

Finally, the district court found that the Secretary could reasonably have concluded that widening Ponce de Leon Avenue, along with improved signalization, would have a greater effect on the Olmsted Park network and the Druid Hills Historic District. This alternative would impact on five of the Olmsted Parks and some land would be taken from the northern side of Ponce de Leon. The discussion of the quantum of harm caused to 4(f) areas by widening Ponce de Leon is the most acceptable of the 4(f) statements in the EIS. The Advisory Council on Historic Preservation is opposed to the Parkway but acknowledged that widening Ponce de Leon would undermine the integrity of the Druid Hills Historic District. *Id.*, Appendix B, at 333, 334. We agree with this portion of the district court's opinion.

In summary, the case must be remanded to the Secretary for adequate findings of the impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue plans. This review should encompass an accurate assessment of the characteristics of the property that will be affected by the alternative, e.g., if the property is in a historic district, whether it has been previously impacted by commercial development and if so, to what extent. The Secretary's review must also address the quantity of harm that will accrue to the park or historic site and the nature of that harm, e.g., visual impact or physical taking. It will not suffice to simply state that an alternative route would affect 4(f) properties without providing some rational, documented basis for such a conclusion. In short, the same consideration must be given to whether these alternative routes would minimize harm to the section 4(f) properties as was accorded the adopted route.

After reviewing the voluminous record in this case, we are mindful of the tremendous task confronting the Secretary in resolving these difficult issues. However, the magnitude of the problem does not diminish the need to follow the stringent requirements of section 4(f)(2). All of the proposed routes involved in this litigation will affect parklands and historic sites to some degree. It is important then that all of these options be carefully examined in an effort to minimize the damage to section 4(f) lands. This is the command of *Overton Park* and *LES II* and we are not free to ignore that directive.

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND to the district court for proceedings consistent with this opinion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DRUID HILLS CIVIC ASSOCIATION, INC., et al.	)	
VERSUS	)	CIVIL NO. C-84-1931-A
FEDERAL HIGHWAY ADMINISTRATION, et al.	)	
NATIONAL TRUST FOR HISTORIC PRESERVATION	)	
VERSUS	)	CIVIL NO. C-84-1977-A
FEDERAL HIGHWAY ADMINISTRATION, et al.	)	(Filed November 14, 1984)

ORDER

Plaintiffs filed these actions on September 24 and 28, 1984, to enjoin construction of the Presidential Parkway project (the Parkway). Pursuant to Fed.R.Civ.P. 65(a)(2), the trial of the case on its merits was advanced and tried with plaintiffs' motion for preliminary injunction. This trial was held on October 22-25, 1984. Upon careful evaluation, the court denies plaintiffs' motion to enjoin construction of the Parkway.

FINDINGS OF FACT

To understand the instant action, a history of proposed transportation improvements in the area is necessary. A major portion of the land upon which the pro-

posed Parkway would be built was acquired by the defendant Georgia Department of Transportation (GDOT) in the 1960s and early 1970s. This area, approximately 219 acres, had been obtained as rights-of-way for multi-highway facilities, one extending north-south, the other east-west. The major proposed highways were I-485 and the Stone Mountain Tollway. In 1971, the United States District Court for the Northern District of Georgia enjoined any further action on I-485 (the north-south road) until GDOT filed an environmental impact statement (EIS). GDOT prepared an EIS, which defendant Federal Highway Administration (FHWA) approved. The Secretary of the United States Department of Transportation (USDOT) rejected the EIS in 1973 because it did not consider fully various impacts and alternatives.

GDOT also had proposed the Stone Mountain Tollway. At a 1972 hearing concerning this project, strong opposition was voiced. As a result of this controversy, Governor Jimmy Carter appointed a commission to investigate the project and make recommendations. The commission noted that the Tollway should not be built at that time. Governor Carter accepted the Commission's recommendation in December, 1972.

The City of Atlanta withdrew its approval of I-485 in 1973. The Atlanta Regional Commission (ARC) deleted the project from its regional plans in 1974. Also in 1974, GDOT removed I-485 from the interstate highway system plan, which action was approved by the FHWA in 1975. In 1977, procedures to dispose of I-485 properties north of St. Charles Avenue began. GDOT retained the acreage south of St. Charles Avenue for possible transportation improvements in the east-west corridor.

From the demise of the expressway plans until the present, numerous reuses of the acreage were suggested. Atlanta Mayor Maynard Jackson proposed a "Great Park" concept in 1974, which would include various recreational and cultural amenities. In 1975, the City of Atlanta created an Ad Hoc Committee for the so-called Great Park, to study *inter alia* transferal of land from GDOT, and reuse with primary emphasis on a park. Upon the Committee's recommendation, the city contracted with Arkhora Associates to prepare a reuse planning study. Arkhora presented "The Great Park—A Proposal by the City of Atlanta for the Redevelopment of Unused Highway Rights-of-Way Within the City." This plan advocated a major passive open space consisting of passive recreation areas, cultural facilities, and housing. GDOT opposed this plan because it did not address legal problems of reusing the land for non-transportation purposes. In 1977, ARC adopted its Regional Transportation Plan (RTP) showing the I-75/85 stub, which had been constructed earlier, connecting to an improved DeKalb Avenue with no specific alignment for the connection.

In October 1975, Atlanta Great Park Planning, Inc. (AGPP), a public non-profit corporation, was formed to plan for disposition and reuse of the property. The AGPP's Board of Directors included representatives of ten neighborhoods, the City of Atlanta, the City of Decatur, DeKalb County, and the State of Georgia. AGPP prepared a report in 1977, noting that the Great Park area could serve not only as a recreation area but could be a stimulus for redevelopment and revitalization. In 1978, AGPP authorized H. Randall Roark to prepare a study of housing opportunities in the right-of-way. The study, pub-

lished in 1979, focused on housing, but adopted the transportation and open space recommendations from the Arkhora study. GDOT did not support this plan for the reasons underlying its opposition to the Arkhora plan.

GDOT retained Evan L. Marbut & Associates, Inc. in 1978 to prepare a park and road concept for the Great Park area. This plan proposed connecting the stub to Moreland Avenue, as well as placing a north-south road in the right-of-way. The remainder of the land would be developed as parks. GDOT approved the plan, but the City of Atlanta and AGPP opposed it as being excessively transportation-oriented.

At the request of Governor Busbee, John Portman, Jr. developed a land use plan for the property. This proposal called for housing units, and a "greenway" of cultural, recreational, and open space uses, including a festival area, amphitheatre, Georgia Hall or museum, cyclorama, aquarium, and the Carter Presidential Library. In connection with this plan Alan M. Voorhees & Associates concluded that a stub connection with DeKalb Avenue would meet the corridor's transportation needs. In Portman's plan, the stub would be connected to DeKalb Avenue via a tunnel. In 1980, GDOT presented a "modified" Marbut plan with connections to Ponce de Leon, Moreland, and DeKalb Avenues.

The Georgia General Assembly created the Great Park Authority (GPA) in 1980 to examine the various plans for reuse of the Great Park, and to develop a master plan for submission in 1981. GPA retained Howard, Needles, Tammen and Bergendoff (HNTB) for advice concerning transportation. HNTB recommended a stub connection

to DeKalb Avenue with three possible connection routes. The GPA plan, presented in 1981, incorporated this recommendation, as well as a park and housing for the Great Park. The General Assembly took no specific action on this plan.

The Parkway plan itself came into existence in the early 1980s. After President Carter left office in 1981, he began to formulate plans for a presidential library and museum, and a policy center (the Complex). He was interested particularly in the Atlanta area, because of its concentration of universities, its accessibility, and its position as state capital. At least by mid-summer 1981, the idea arose to build the complex within the Great Park tract. (Testimony of Danny Lee, Transcript, Volume III, at 140). The site was considered ideal because of its proximity to the central business district and universities, and its relative seclusion.

In 1981, Thomas Moreland, Commissioner of GDOT (Moreland) met with Charles Kirbo (Kirbo) an associate of President Carter, at Troncalli Motors. According to Moreland's testimony, Kirbo told him that the Great Park area would be a good site for the Complex. (Test. of Thomas Moreland, T-II, at 227). Kirbo stated that a transportation connection with Emory would be needed. Moreland testified that he did not promise or tell Kirbo that he would put a road in that tract, if the Carter people cooperated. (*Id.* at 230).

In 1981 Andrew Young sought election as mayor of Atlanta, in part on a platform of opposition to any roadway through the Great Park. After his election, Mayor Young reversed his position and in 1982 supported the so-

called Mayor's Plan. This proposal basically is the alternative sought to be enjoined in the instant lawsuit. It included a 2.4 mile four lane parkway. The Complex would be situated in the center of the tract, approximately thirty acres. Throughout the first half of 1982, the mayor's office presented the plan to the GPA, ARC, various neighborhood organizations, neighborhoods, and concerned citizens. A public hearing was held on June 29, 1982 at City Hall. On July 6, 1982, the Atlanta City Council approved the plan. GDOT also approved the plan. In September, 1982, the ARC amended its RTP to delete the Decatur Parkway/DeKalb Avenue Connector and to insert the Parkway in lieu thereof.

In August, 1982, the FHWA placed a notice of intent to prepare an EIS in the Federal Register. The notice set up the framework for commenting on the proposal, referenced the earlier meetings, and stated that a public hearing would be held. It also named David Densmore, highway engineer with FHWA (Densmore), as contact person for the project.

Throughout the remainder of 1982 and the beginning of 1983, GDOT and FHWA, the latter as lead agency, prepared the Draft Environmental Impact Statement (DEIS). On April 21, 1983, FHWA signed the DEIS. Approximately 1,000 copies were distributed to agencies, organizations, and individuals. The DEIS contained 193 pages of text, inclusive of photographs, charts, maps, bibliographies, and lists of meetings and preparers. Nine appendices totaling approximately 89 pages were attached, including correspondence, plans, and various technical charts and figures. The DEIS discussed the build, or Parkway alternative, in some detail, the no-build alternative in two sen-

tences, and "other alternatives," in a few pages, including a road only to the library, a road to Moreland, Avenue, improvements on existing streets, a two lane parkway, and the Decatur Parkway. Some additional discussion of alternatives occurred within sections addressing impact on specific properties.

Because a large number of comments concerning the project were received both before and after the presentation of DEIS, GDOT and FHWA conducted four public information meetings. The first three were held between May 31 and June 2, 1983, in neighborhoods adjacent to the project. Court reporters were available and comments were received. The meetings generally were well-attended. The fourth meeting was held on June 7, 1983, at the Atlanta Civic Center. Later that day, the public hearing was held, consisting of a formal presentation followed by a public comment session. Court reporters were available in the lobby and auditorium to receive oral comments; written ones also were accepted. Between 1,500 and 3,000 people attended this hearing. The hearing record and public comment period were left open until July 25, 1983. Approximately 2,000 persons commented on the project. In August, 1983, GDOT made the decision to proceed with the final EIS (FEIS) around the build option (Test. of Peter Malphurs, State Environmental Analysis Engineer, GDOT (Malphurs) T-III, at 188-89).

Among those commenting on the project were various federal agencies, including the Department of Interior (DOI), the General Services Administration (GSA), and the Environmental Protection Agency (EPA). Many comments expressed reservations concerning several aspects of the project, including air quality studies, and impacts on

parks and hisforic properties. Meetings between FHWA, GDOT, and agencies were held to discuss these comments. GDOT and FHWA also prepared a separate environmental review concentrating on historic resources. This review, or Preliminary Case Report (PCR) was sent to the Georgia Department of Natural Resources (DNR) on October 25, 1983. DNR commented on the PCR, which was revised to reflect these comments. The PCR was forwarded to the Advisory Council on Historic Preservation (ACHP) for comment in November, 1983. The PCR was made available to the public, and the ACHP received many comments thereon.

The ACHP reviewed the PCR, and recommended that GDOT and FHWA give further consideration to the Moreland Avenue termination alternative, with other transportation improvements. FHWA responded that it and GDOT had given sufficient attention to the Moreland Avenue alternative, as well as others, but had concluded that they were not feasible and prudent to fulfill transportation goals.

The Chairman of the ACHP determined that the full council should consider the matter at a public hearing. This meeting was held on February 27, 1984. The ACHP voted 12-4 to recommend that the Parkway not be built, but that the Carter Complex be constructed on the site. FHWA responded to the ACHP comments on April 17, 1984.

The final E.I.S. (FEIS) was approved on May 22, 1984, and distributed to interested parties. The FEIS, Volume I, contained 345 pages of text, including analyses, bibliographies, charts, graphs, and lists. The appendices covered approximately 470 pages, and contained *inter alia,*

comments and responses, studies, and charts. In addition, the PCR, submitted as Volume II of the FEIS, contained 115 pages of text, including pictures, bibliography, and charts. Approximately 90 pages of the PCR were comments and responses, an additional 100 pages was an archaeological survey, and reports on historic districts and comments consumed approximately 300 pages. In addition to alternatives mentioned in the DEIS, the FEIS discussed additional road improvements, MARTA, one way pairings, staggered work hours, charges for driving, and a more detailed discussion of the Decatur Parkway-DeKalb Avenue alternative.

Notice of the approval of the FEIS was published in the Federal Register. Comments on the FEIS were submitted by the EPA, DOI, individuals, and organizations. On June 25, 1984, the Chairman of the ACHP filed a Notice of Referral with the Council on Environmental Quality (CEQ). The CEQ held a public hearing on July 17, 1984 to consider whether to accept the referral. It also solicited comments on the matter, and received numerous responses. On September 20, 1984, the CEQ determined that the proposed Parkway was not of such national significance to warrant its interjection into the process. The CEQ further requested that the FHWA continue its normal decisionmaking process. The FHWA, through the Secretary of USDOT's designee, William Van Luchene, approved and executed a record of decision on September 21, 1984.

Carter Library, Inc., the developing and coordinating entity for the Complex, obtained title to 3.2 acres of the tract on October 2, 1984 via a landswap with GDOT (the

"Footprints"). The Complex itself would be constructed on the Footprints. Construction commenced on that date. The remaining acreage surrounding the Footprints, and circumscribed by the Parkway, is to be a "roadside park," titled in GDOT, and maintained by Carter Library, Inc. GDOT has advertised for bids on the parkway construction. Bids were opened on October 26, 1984. The awarding of contracts is pending and must be made within thirty days from that date.

* * *

1. *§ 4(f)(1) ANALYSIS*

Defendants considered that the No-Build alternative was imprudent because it would not address transportation needs, thus resulting in further traffic and safety problems. It was considered to cause major disruption because it might lead to a reduction in scope or loss of the Carter Complex, and its cultural and educational resources. A direct link with the central business districts and the universities would not have occurred. It would have resulted in a loss of amenities surrounding the Parkway.

The No-Build alternative certainly is feasible; nothing need be constructed. An alternative that does not fulfill the need which a project is designed to address, however, is not a prudent alternative, *LES*, 537 F.2d at 85. ("... the no-build alternative [was] imprudent because [it] failed to fulfill the needed purpose of a circumferential highway route"). The court previously has found defendants' contention that a transportation need exists to be reasonable. Therefore, defendants' rejection of No-Build as imprudent also is reasonable.

Additionally, defendants contend that No-Build is not prudent because the loss of the Carter Complex, amen-

ities, and housing, and the traffic and safety problems would amount to disruption to the community of extraordinary magnitude, or would be unique factors. This argument has some merit. Safety and traffic considerations themselves are not enough to overcome § 4(f) protections. The Carter Complex itself, however, would be a cultural and historic amenity of far reaching significance to the community, to Atlanta, and to the state. Although a dearth of case law on such an unusual situation exists, the court is persuaded that the loss of the Carter Complex could well be a truly unique or unusual factor. *See Overton Park,* 401 U.S. at 413. Thus, even if No-Build were prudent, the magnitude and uniqueness of the Carter Complex could justify an exception to the prudent requirement.

Defendants also considered improvements to Ponce de Leon, including updated signalization, widening to four twelve foot lanes, and new turning lanes at intersections. FEIS, at 238-39. Defendants do not assert that this alternative is not feasible. They claim that it is not prudent, because it will not satisfy the transportation need that the Parkway would fulfill. *See LES,* 537 F.2d at 85. More important, this alternative would impact upon § 4(f) areas: Druid Hills Historic District and five Olmstead Parks. Thus, it is not a prudent alternative to the Parkway, and will be considered further under § 4(f)(2). *Id.*

The Decatur Parkway alternative would begin at the I-75/85 stub, proceed easterly toward the Complex, and turn south through existing right-of-way to join DeKalb Avenue. That street would be improved to a five-lane controlled access facility with a variable width landscaped median, twelve foot lanes, a side-walk, bike path, and a landscape buffer. FEIS at 192.

Defendants again have not claimed that this alternative is not feasible, but that it is imprudent. First, it will not fulfill transportation needs in the corridor. This is true especially if Clifton Road is the eastern terminus, because traffic would be unable to go north toward the Ponce de Leon area without using busy roads and neighborhood streets, *Id.* at 194. Additionally, § 4(f) sites would be impacted, including Moreland Historic District, Inman Park Historic District, and Candler Park Historic District. The alternative's extension northeastward to tie in to the Ponce corridor would assist in meeting transportation goals, but would impact even more of Candler Park Historic District, as well as Sycamore Street Historic District. *Id.* at 196-97. The alternative impacts § 4(f) property, and is not prudent. It will be analyzed under § 4(f)(2).

Two alternatives concerning Moreland Avenue were presented: a parkway termination at Moreland, and one terminating there with a related north-south roadway on existing rights-of-way, and a proposed future extension to Lullwater Road (the Marbut Plan). FEIS at 199. The Marbut Plan, with its proposed extension to Lullwater, would impact on § 4(f) property in the Candler Park and Druid Hills Historic Districts. The north-south leg would impact on § 4(f) lands in the North Highland/North Avene, Moreland, and Inman Park Historic Districts. The plan thus would not be a prudent alternative, and will be discussed under § 4(f)(2).

The other plan would terminate the Parkway at Moreland, with no plans for future extension. Because all Parkway traffic would exit at Moreland, an already busy street,

the intersections of Moreland at North Avenue and at once de Leon would be upgraded. Additionally Ponce de Leon and Moreland would be widened. Defendants believe that this plan will not provide fully for transportation needs. The plan also would impact § 4(f) property in the Olmstead Parks, the Druid Hills Historic District, and the North Highland/North Avenue Districts. Thus, it is not a prudent alternative and will be considered under § 4(f)(2).

The FEIS also mentioned an alternative to the north of Candler Park Historic District, FEIS at 232, 237, which was rejected because it would impact on Druid Hills Historic District and require residential displacements therein. An alternative south of Candler Park was studied, *id.* at 238, but also was not accepted. This alternative would have impacted on the Candler Park Historic District.

An alternative that the Parkway extend from downtown to the Complex was rejected because it would not satisfy transportation requirements. FEIS at 48-49. The FEIS also discussed a two lane Parkway. This alternative would not have addressed the need completely, and additionally would have impacted § 4(f) properties.

Another alternative would make Edgewood and DeKalb Avenues into one way pairs. The FEIS noted that this would be infeasible, and still would impact Inman Park Historic District. The one-way pair of Boulevard and Parkway Drive would not be feasible, and failed to meet transportation goals.

In sum, the evidence indicates the defendants considered numerous alternatives, and reasonably could have concluded that no feasible and prudent alternatives existed.

2. § 4(f)(2) *ANALYSIS:* § 4(f) ALTERNATIVES

Because some of the alternatives would impact on § 4(f) land, they must be analyzed under the second criterion of § 4(f): whether they minimize harm to § 4(f) property. These alternatives are improvements on Ponce de Leon, Decatur Parkway, Moreland Avenue termination, roads north of Candler Park Historic District, and south of Candler Park, and a two-lane parkway.

The defendants' conclusion that the last three alternatives would not minimize harm and were not prudent was reasonable. The roads north and south of Candler Park would have impacted Druid Hills Historic District and Candler Park Historic District to a much greater degree than would the Parkway. FEIS, at 237-38. Thus, defendants' decision that the Parkway would do less harm to those areas and to § 4(f) property in general was reasonable. Additionally, rejection of the two lane parkway alternative was reasonable. That roadway would not have met transportation needs, but would have caused equal § 4(f) harm. Thus the defendants could choose between the two versions of the Parkway, *LES,* 537 F.2d at 85, and their choice was reasonable.

Defendants stated that Ponce de Leon Avenue improvements would require additional right-of-way for the length of five of the Olmstead Parks and along the northern side of Ponce de Leon. Existing pavements would have been widened. Turning lanes at Oakdale, Springdale, Lullwater, and Clifton Roads would have required additional right-of-way to accommodate at least sixty feet of roadway. Approximately seven to eight acres would be used

from the Druid Hills Historic District, and five of the Olmstead Parks would be impacted. FEIS, at 238-39.

Defendants concluded that the improvements alternative would impact more severely on § 4(f) property. Even though Goldsboro and Candler Parks would be avoided, five Olmstead Parks, rather than two, would be impacted. *Id.* Additional land from the northern side of Ponce de Leon, in the Druid Hills Historic District, would be taken. Defendants' conclusion that the § 4(f) harm from improvement would be greater than that from the Parkway was reasonable. Even commentators who opposed the Parkway believed that the improvements alternative was improper because of the damage to the Olmstead Parks. *See e.g.,* FEIS, at B-333. Because defendants reasonably found that improvements would not minimize harm, they could choose the Parkway alternative, *LES,* 537 F.2d at 85-86.

The Decatur Parkway alternative would impact § 4(f) sites in Moreland Historic District, the Candler Park Historic District, and an archaeological site (a turn of the century garbage dump), assuming its eastern terminus at Clifton Road. Additional rights-of-way would be needed from both historic districts. Visual impacts upon the Inman Park Historic District would occur. *See LES,* 537 F.2d at 85. (visual impact can be a use of a § 4(f) area). In balancing the harm to § 4(f) property between this alternative and the Parkway, defendants decided that the Parkway would minimize § 4(f) impact. The Parkway would not require the taking or displacement of any homes or businesses in the historic districts; the Decatur Parkway would necessitate such actions.

Whether the harm to the § 4(f) properties caused by Decatur Parkway would be greater than those occasioned by the Parkway is a difficult question. Both plaintiffs and defendants recognize the significance of the Olmstead Parks. Their preservation could outweigh the taking of other properties. Thus, impacts on other § 4(f) properties which avoid the Olmstead Parks could be considered a minimization of harm.

An alternative that will impact less severely on § 4(f) property may be rejected if it is not feasible and prudent. *LES*, 537 F.2d at 86. Defendants concluded that the Decatur Parkway would not fulfill the corridor's need, especially when terminated at Clifton Avenue. In fact, it could exacerbate the filter through traffic problems. Thus, defendants reasonably could have believed that the Decatur Parkway was imprudent because it did not fulfill transportation needs. Extension of the Decatur Parkway would enhance its capacity to serve the transportation need; however, even more § 4(f) property would have been impacted. Defendants reasonably could have determined that these further impacts would increase § 4(f) harm over that caused by the Parkway. Thus, defendants' rejection of this alternative was reasonable.

The Moreland Avenue termination plan and the Marbut plan also impact on § 4(f) property. The Marbut plan would affect § 4(f) areas in Candler Park and in the Druid Hills, Moreland, Inman Park, and North Highland Historic Districts. With its proposed future extension to Lullwater Road, the plan would cause at least the same impacts as would the Parkway. Its north-south legs would affect even more § 4(f) property. Defendants' decision

that this alternative does not minimize harm was reasonable.

The Moreland Avenue termination plan would require widening of Ponce de Lean east of Moreland to accommodate Parkway traffic. Moreland also would have to be improved. The intersections of Moreland with North Avenue and Ponce de Leon would have to be upgraded. Obviously, any effect of the Parkway before reaching Moreland Avenue would be equal for both plans. The Moreland termination plan also would impact more severely on the North Highland/North Avenue Historic District, the Druid Hills Historic District (western end of Fairview Road), and the Olmstead Parks (by widening Ponce de Leon). FEIS, Vol. I, at 203-04; Vol. II, at 104.

The effects of widening Ponce de Leon, discussed earlier, would be severe on the Olmstead Parks. Because of their significance, the defendants could reasonably believe that an alternative impacting on them more severely than the Parkway would not be acceptable. Additionally, defendants' belief that Moreland and Ponce de Leon would require widening was reasonable. A Parkway termination there would increase traffic on already crowded thoroughfares. To handle the problems, some widening could well be necessary.

Defendants' balancing of harm, which indicated that the effects of the Moreland Avenue termination would not minimize § 4(f) impacts, was reasonable. Even if the Moreland termination minimized harm, defendants still reasonably concluded that the alternative did not fulfill transportation needs. Defendants found that the termination plan would handle only a portion of traffic, would increase

congestion on Moreland and on Ponce de Leon east of Moreland, and would not reduce through street traffic. Thus, they reasonably could have believed that the Moreland termination plan was not prudent.

Plaintiffs have noted that various commentators recommended the Moreland Avenue termination. Specifically, they point to a letter from DOI, dated July 12, 1984, plaintiffs' Ex. 15. This letter recommends the Moreland Avenue termination with the following comment:

> Since our experience with similar cases over the years, as well as knowledge of the special circumstances surrounding this corridor in the Atlanta area, leads us to believe that such extension and/or reconstruction is inevitable if the Parkway is built as proposed, we must hold that the final statement is deficient in addressing the true extent of Section 4(f) impacts of the project. In our opinion, the only way to minimize these impacts, and to satisfy the second proviso, is to not construct the Parkway east of Moreland Avenue.

DOI apparently believed that the project was segmented improperly, and that the Moreland Avenue termination would be the only way to prevent further expansion. The court held earlier that the evidence does not indicate improper segmentation. The impact of DOI's opinion thus is lessened because its decision apparently contemplates speculative future harm to § 4(f) properties not shown by the evidence.[9]

3. SECTION § 4(f)(2) ANALYSIS: PARKWAY'S MINIMIZATION OF IMPACT

In addition to considering alternatives which minimize § 4(f) impact, defendants must use all possible plan-

ning to minimize the Parkway's § 4(f) harm. Defendants claim that the Parkway has been designed to do so. The Parkway would create new parklands (the roadside park at the Carter Library), playgrounds, and amenities (bike and jogging trails). The Carter Complex will be circumscribed and accessed thereby. The road itself would be a lower speed facility, with design speed of forty five m.p.h. The Parkway's design includes roadway at cut as often as possible, extensive use of landscaping, noise barriers, and stylized bridges with presidential motifs. (Test. of Muldawer, T-III at 90-97).

Besides its design concepts, the Parkway includes specific measures to minimize § 4(f) harm. A modified "T" intersection was chosen where the Parkway intersects Ponce de Leon, because it required the smallest amount of land from Shady Side Park, caused less disruption in the Olmstead Park design, and allowed retention of vegetation. FEIS at 205. Additionally, the design of the "T" intersection was modified to preserve three large oak trees in Shady Side Park. *Id.* Reduced right-of-way would minimize encroachment on vegetation at Lullwater Creek. *Id.* at 210. Rights-of-way through Dellwood Park also would be lessened, to preserve as much land as possible. *Id.* at 225.

Impacts on Candler Park would be lessened by landscape shielding, and reduction of rights-of-way. A nine degree curve through the park would permit the northern section to be used as a golf course. Because the golf course would be impacted, a new golf course is planned, using vacant land at Terrace Avenue adjacent to the park. *Id.* at 239-40. The Parkway would pass over Goldsboro Park, an alternative that would minimize actual taking.

Goldsboro Road would be a dead-end street, which requires less land than would a cul-de-sac. The bridge itself would contain "presidential theme" artwork, and landscaping would be used to minimize the bridge piers' impact. *Id.* at 245-46.

The record and FEIS contains other examples of plans to minimize harm. The court believes that those set forth herein indicate that defendants have done a great deal of planning to minimize the Parkway's § 4(f) impact. Based upon the evidence presented, the court concludes that defendants reasonably could believe that the Parkway included all possible planning to minimize § 4(f) harm.

B. ARBITRARY AND CAPRICIOUS REVIEW

The next phase of § 4(f) inquiry is whether defendants acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Overton Park,* 401 U.S. at 416 (quoting 5 U.S.C. § 706(2)(A)). To determine whether this occurred, the court must ascertain whether the decision was based on consideration of relevant factors and whether a clear error of judgment was made. *Overton Park,* 401 U.S. at 416. The ultimate standard of review, although searching, is narrow; the court may not substitute its judgment for that of the decisionmakers. *Id.*

Plaintiffs allege that defendants based their § 4(f) considerations on improper factors, such as political pressure, need, cost, and unfairly skewed comparisons. The court has held that plaintiffs have not presented evidence of improper political pressure. Additionally, consideration of need is proper in determining whether a § 4(f) alternative is prudent. *LES,* 537 F.2d at 85, 87.

Cost is not a proper consideration in §4(f) determinations unless it reaches extraordinary magnitudes. *Overton Park*, 401 U.S. at 413. Defendants discussed cost in their analyses of alternatives, to indicate that it was of extraordinary magnitudes (the Decatur Parkway, the Portman Tunnel). Although the court is not convinced that these costs would reach the strict extraordinary magnitude standard, the evidence indicates that the § 4(f) determinations were supported primarily by the permissible factors of need and § 4(f) minimization.

The evidence shows that defendants reasonably considered the scope of each alternative, and did not skew comparisons unfairly. Defendants discussed the effects of Decatur Parkway beyond Clifton Road because that route alone would be comparable to the Parkway's fulfillment of transportation need. The widening of Moreland and Ponce de Leon in the Moreland termination alternative was considered because traffic patterns indicate that such action would be necessary.

Nor can the court say that defendants made a clear error of judgment. They evaluated each proposed alternative. Their choices and decisions were reasonable. Supporting this finding is the assertion of the actual decisionmaker, Van Luchene, that he was not acquainted with the primary "actors" in the Parkway drama, that he was new to the area, that he reviewed the administrative record, and that his only instructions were to be impartial. Thus, the court cannot state that defendants abused their discretion or acted in an arbitrary and capricious manner during their § 4(f) determinations.[10]

C. MADEIRA PARK

Plaintiffs allege that defendants' failure to apply § 4(f) protection to the land known as Madeira Park violates that statute. The City of Atlanta deeded Madeira Park to GDOT on May 17, 1967, for right-of-way use in connection with proposed I-485. In 1970, GDOT determined that Madeira Park had ceased to exist, and thus was not covered by § 4(f). Upon GDOT's request for compliance, FHWA inspected the site and found it overgrown and abandoned. FHWA therefore concurred in GDOT's determination on May 18, 1970. Again in March, 1972, FHWA determined that § 4(f) did not cover the former park. USDOT questioned this conclusion because supporting documentation was not included. FHWA did not respond to USDOT's concerns because the I-485 project finally was abandoned.

In preparation of this EIS, the applicability of § 4(f) to the site of Madeira Park once again was considered. Examination of the site revealed that the area was overgrown, lacked identifiable physical boundaries, and had been abandoned as a park. (Test. of David H. Densmore, T-IV, 137-39). FHWA and GDOT again determined that Madeira Park no longer was significant parkland. On May 21, 1984, USDOT noted its approval of the entire project. It did not mention any objections to lack of § 4(f) coverage of Madeira Park.

The court finds that defendants' decision to exclude the former Madeira Park from § 4(f) considerations was proper. The park was titled to GDOT seventeen years ago for transportation usage. It is kudzu-infested, overgrown, and lacks distinguishable boundaries. Additionally, plaintiffs have presented no evidence that the area is be-

ing used as a park. Therefore, the court cannot state that defendants have acted unreasonably, arbitrarily, or capriciously in refusing to apply § 4(f) protections to land that formerly was Madeira Park.

CONCLUSION

Cases such as these receive much public attention, and become very emotional and hard fought with the neighborhoods and parties involved. This court has endeavored not to substitute its own judgment as to the merits, or lack thereof, of the project for that of the governmental agencies involved. The standard of review as previously discussed is narrow, and this court has endeavored to adhere to that standard as mandated by the Congress and judicial authority.

The court finds from the evidence in this case that the defendants acted reasonably and in good faith objectivity, even though at times certain conduct may have been less than praiseworthy. The actions of the decision-makers were not arbitrary, capricious, or abuses of discretion.

The court denies the plaintiffs' motions for preliminary and permanent injunction in each case and directs the clerk to enter judgment for the defendants in each case.

IT IS SO ORDERED this 14th day of November, 1984.

/s/ William C. O'Kelley
United States District Judge

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[1] Morningside-Lenox Park Ass'n v. Volpe, 334 F.Supp. 132 (N.D. Ga. 1971) (Moye, J.).

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[7] Another DeKalb Avenue alternative suggested was widening the street by one lane. This still would have impacted on § 4(f) property and would not have satisfied need requirements. Thus, it reasonably could be subsumed in the Decatur Parkway alternative. *See* FEIS, Vol. II, at 29-34.

An additional suggested alternative was to connect the I-75/85 stub directly to Decatur Street/DeKalb Avenue. Defendants considered this alternative and concluded that it was not feasible. (Test. of Rives, T-III, at 39-43). The court finds this conclusion to be reasonable. The City of Decatur opposes both the Parkway and the DeKalb Parkway.

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[8] MARTA was considered as an alternative, but would not fulfill need. FEIS at 24-25. Thus defendants reasonably could have found it imprudent.

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[9] Although not discussed in each section, the court notes that any alternative resulting in the loss of the Carter Complex reasonably could be found to be an extraordinary disruption or a unique factor mitigating § 4(f) loss. *See* discussion *supra,* at 46-47.

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[10] The third prong of the *Overton Park* test is whether the agency has followed procedural requirements. The court cannot find any assertions that defendants did not meet this standard. Additionally, the court's review of the record has not revealed any procedural inadequacies.

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Eleventh Circuit

No. 87-8122

D.C. Docket No. 84-1931

DRUID HILLS CIVIC ASSOCIATION, INC., et al.,
Plaintiffs-Appellants,

versus

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

No. 87-8149

D.C. Docket No. 84-1931

(Filed March 22, 1988)

DRUID HILLS CIVIC ASSOCIATION, INC., et al.,
Plaintiffs,

versus

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants.

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES,
Appellant.

Appeals from the United States District Court for the Northern District of Georgia

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Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HAND*, Chief District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 16, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ W. Rowe G. Godfrey
Deputy Clerk

ISSUED AS MANDATE: MAR 22, 1988

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*Honorable William Brevard Hand, Chief U.S. District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8122

DRUID HILLS CIVIC
ASSOCIATION, INC., et al.,
Plaintiffs-Appellants,

versus

FEDERAL HIGHWAY
ADMINISTRATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

(Filed February 19, 1988)

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion December 16, 11 Cir., 1987, 833 F.2d 1545).

Before RONEY, Chief Judge, HATCHETT, Circuit Judge and HAND*, Chief District Judge

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

ORD-42

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*Hon. William Brevard Hand, Chief U. S. District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX G

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DRUID HILLS CIVIC ASSOCIATION, INC., et al.,

V. Civil Action No. 84-1931A

FEDERAL HIGHWAY ADMINISTRATION, et al.,
ORDER MAKING MANDATE THE JUDGMENT
OF THE U.S. DISTRICT COURT

(Filed November 15, 1985)

The Mandate of the U.S. Court of Appeals for the Eleventh Circuit having been read and considered, same is hereby made the judgment of this Court.

SO ORDERED this 15th day of November, 1985.

/s/ William C. O'Kelley
William C. O'Kelley
United States District Judge

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article III, Section 2 of the United States Constitution:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> And all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

2. 5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affecting or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

3. Federal Rule of Civil Procedure 41(a)(2):

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dis-

missed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

4. 28 U.S.C. § 2412(a):

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

Supreme Court, U.S.
FILED
JUN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1891

In The
Supreme Court of the United States
October Term, 1987

DRUID HILLS CIVIC ASSOCIATION, INC., *et al.*,
Petitioners,

v.

THE FEDERAL HIGHWAY ADMINISTRATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant Attorney General

ROLAND F. MATSON
Senior Assistant Attorney General

PLEASE SERVE:

ROLAND F. MATSON
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
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QUESTIONS PRESENTED

1.

Whether the district court abused its discretion in finding an order remanding an action to an administrative agency for further action is not a final order which deprives the court of jurisdiction thereafter.

2.

Whether the district court abused its discretion in denying Plaintiffs' Conditional Motion for Voluntary Dismissal after a four-day trial, appeal, remand, and filing of Motion for Summary Judgment by Defendants.

3.

Whether the district court abused its discretion in granting a Motion for Summary Judgment which was substantively unopposed.

4.

Whether the district court abused its discretion in denying attorney's fees to a non-prevailing party.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Druid Hills Civic Association, Inc., Inman Park Restoration, Inc., Candler Park Neighborhood Organization, Caution, Inc., Jack Boozer, Phyllis Schwartz, John T. Juricek, Neil C. Moran, William E. McMurray, and Quinn Hudson. The corporate petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

The parties below also were respondents The Federal Highway Administration, United States Department of Transportation, R. A. Barnhart, D. J. Altobelli, Thomas D. Moreland, Georgia Department of Transportation, United States Environmental Protection Agency, Carl Jeter, and the United States of America.

Amicus curiae below was Carter Presidential Library Inc.

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STATEMENT OF THE CASE

Proceedings Below

Respondents Georgia Department of Transportation and Thomas D. Moreland ("State Respondents") feel compelled to review the proceedings below because of Petitioners' flagrant mischaracterizations of those proceedings.

In September of 1984 the Federal Highway Administration and U.S. Department of Transportation approved the Environmental Impact Statement and made the Section 4(f) determinations on the Presidential Parkway project in Atlanta, Georgia. The project connects the central business district with the eastern suburbs and provides access to the Carter Presidential Library.[1] Within days Petitioners filed this action seeking to enjoin construction of the Parkway.

After a four-day trial in October of 1984, the district court refused the injunction and found in favor of the state and federal defendants on each issue. On appeal the Eleventh Circuit affirmed the district court on most of the issues, but was "unable to review the correctness of the district court's findings" on the Section 4(f) comparisons of two alternates because the document did not show the facts upon which the Secretary of Transportation relied. *Druid Hills Civic Association, Inc. v. Federal Highway Administration*, 772 F.2d 700, 717-18 (11th Cir. 1985). The case was remanded to the "district court for proceedings

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[1]Carter Presidential Library, Inc. has been an *amicus* in support of the state and federal defendants at every stage of this litigation, stating it has and continues to support the Parkway concept as proposed.

consistent with this opinion." 772 F.2d at 719. The Eleventh Circuit's opinion, which included the direction that "the case must be remanded to the Secretary" (772 F.2d at 718), was made the judgment of the district court on November 15, 1985. Although the case was still pending, Petitioners moved for an award of attorney's fees, which was opposed by all Respondents.

In April of 1986 the federal defendants filed a supplemental record and the Secretary of Transportation's revised Section 4(f) determinations with the district court. They then filed a Motion for Summary Judgment that the revised determination met the mandates of Section 4(f). This motion, substantively unopposed, was granted by the district court. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 650 F. Supp. 1368 (N.D. Ga. 1986). The ruling was affirmed by the Eleventh Circuit. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 833 F.2d 1545 (11th Cir. 1987). Motions for Rehearing and Rehearing *en banc* were denied and Petitioners' Application for Writ of Certiorari followed.

Statement of Facts

Petitioners' Statement of Facts, while essentially correct, is given to overstatement. Petitioners imply that the proposed Parkway cuts through every historic district in Atlanta, but the record shows it was carefully planned to avoid all but the southern-most fringe of one historic district. Nor does the road destroy four parks; it in fact touches four parks, but destroys none:

Park Name	Present Acreage	Net Usage	Remaining Acreage
Goldsboro Park	2.9	0.6	2.3
Candler Park	58.0	2.9	55.1
Shady Side Park	4.5	0.9	3.6
Dellwood Park	6.0	0.05	5.95

The Eleventh Circuit has never characterized the Secretary of Transportation's decisions as legally insufficient. Rather, the Circuit Court remanded the case because the Section 4(f) determination was not sufficiently documented for the court to reach a decision on some aspects of it. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 717-18 (11th Cir. 1985).

Most important to an evaluation of the decisions in this case is the fact that the Petitioners *elected* not to respond to the merits of the federal Motion for Summary Judgment. As late as thirty days before a hearing on that motion the district court invited a substantive response from the Petitioners, which they elected not to make. *See,* App. A.

SUMMARY OF ARGUMENT

Petitioners seek review of merely the application of settled principles to the particular facts of this action. The Respondents' election not to dispute the substance of the Federal Highway Administration's Motion for Summary Judgment has left no substantive issue for decision.

An order remanding an action to an administrative agency for further action is an interlocutory order.

Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); *Howell v. Schweiker,* 699 F.2d 524 (11th Cir. 1983). Such an order does not deny the district court of jurisdiction of the matter. *Taylor v. Heckler,* 778 F.2d 674 (11th Cir. 1985). This principle has been applied to numerous environmental cases. *See, e.g., Louisiana Environmental Society v. Dole,* 707 F.2d 116 (5th Cir. 1983); *Stop H-3 Association v. Coleman,* 533 F.2d 434 (9th Cir. 1976); *Fayetteville Area Chamber of Commerce v. Volpe,* 515 F.2d 1021 (4th Cir. 1975), *cert. den. sub. nom. Interstate 95 Committee v. Coleman,* 423 U.S. 912 (1975). The district court was correct in retaining jurisdiction of this action.

After a four-day trial, denial of their requested injunctions, an appeal affirming findings for the Respondents on all Environmental Impact Statements and most Section 4(f) issues but remanding on one issue, additional development of that issue and the filing of the Federal Highway Administration's Motion for Summary Judgment, Petitioners filed a Conditional Motion for Voluntary Dismissal without prejudice. Based upon findings of prejudice against Respondents, the district court properly denied the motion. *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506 (11th Cir. 1987).

After the Federal Highway Administration filed its Motion for Summary Judgment Petitioners elected not to respond substantively, despite a request from the district court. They failed to comply with F.R.C.P. Rule 56(f) and also did not file an appropriate response to the motion under Local Rule 220-5(b)(2). By Petitioners' own election the motion was unopposed and properly granted. *Simon v. Kroger Company,* 743 F.2d 1544 (11th Cir. 1984), *cert. den.* 471 U.S. 1075 (1985).

The primary relief sought by the Petitioners from the outset of this action has been to enjoin construction of the Presidential Parkway. However, no injunction has ever been issued by any court. Petitioners have never received any relief on the merits of their claim; the only relief they have ever gotten is a remand. This is insufficient to have them considered a prevailing party and entitled to attorney's fees. *Hanrahan v. Hampton,* 446 U.S. 754 (1980); *Kitchen Fresh, Inc. v. NLRB,* 729 F.2d 1513 (6th Cir. 1984); *McGill v. Secretary of Health and Human Services,* 712 F.2d 28 (2nd Cir. 1983), *cert. den.* 465 U.S. 1068 (1984). Additionally, on remand it was the Secretary, not the State Respondents, responsible for relief. Because Petitioners did not prevail against the State Respondents, no attorney's fees can be awarded against those Respondents. *Kentucky v. Graham,* 473 U.S. 159 (1985).

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REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioners' Application for Writ of Certiorari presents no substantive issue for this Court's determination. The issues presented address only the application of well-settled procedural principles. There is no conflict among the circuits over the principles themselves or over their application to the facts of this case.

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPLE THAT A REMAND ORDER IS NOT A FINAL ORDER.

Petitioners' contentions on the jurisdictional issue are based upon the erroneous proposition that a remand order is a final order. They contend that the Eleventh Circuit's September 16, 1985, decision remanding this case to the Secretary of Transportation (*Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700 [11th Cir. 1985]), ended the litigation and required the Federal Highway Administration to commence a "new administrative proceeding." Petitioners use this erroneous supposition to bootstrap the argument that the district court retained no jurisdiction over the later developments in this case. The argument not only distorts the facts but overlooks the substance of the Eleventh Circuit's remand order and controlling valid precedent.

In the original Complaint Petitioners prayed that the construction of the Presidential Parkway be permanently enjoined because of alleged erroneous environmental decisions. (R1-1-21). After trial, the Eleventh Circuit affirmed all of the district court's findings against Petitioners on each of the Environmental Impact Statement (42 U.S.C. § 4332) issues. 772 F.2d at 708-13. However, after approving some of the district court's findings in favor of the Federal Respondents on Section 4(f) issues, the Eleventh Circuit remanded " . . . to the Secretary for adequate findings of impact on 4(f) properties caused by the Decatur Parkway and the two Moreland Avenue

plans." 772 F.2d at 718. The Section 4(f) issues raised by Petitioners, and the relief sought in their Complaint, were not fully resolved at the time of remand. Additional work was needed on the part of the United States Secretary of Transportation.

Pursuant to the Eleventh Circuit's decision, the district court remanded this case to the Secretary. (R4-33). An order remanding a cause for further administrative agency action is uniformly held to the interlocutory and not final. *See, e.g., Bender v. Clark,* 744 F.2d 1424, 1426-27 (10th Cir. 1984); *Howell v. Schweiker,* 699 F.2d 524, 526-27 (11th Cir. 1983); *McCoy v. Schweiker,* 683 F.2d 1138, 1141 n.2 (8th Cir. 1982); *Tookes v. Harris,* 614 F.2d 1296 (5th Cir. 1980), *see* 699 F.2d at 528; *Eluska v. Andrus,* 587 F.2d 996, 999 (9th Cir. 1978); *Pauls v. Secretary of the Air Force,* 457 F.2d 294, 297-98 (1st Cir. 1972); *Mayersky v. Celebrezze,* 353 F.2d 89 (3rd Cir. 1965). The Eleventh Circuit thus concisely restated what has long been the law when it provided:

> "Because this circuit considers a remand order an interlocutory order, it follows by operation of law that the district court retains jurisdiction of the case until the proceedings on remand have been concluded." *Taylor v. Heckler,* 778 F.2d 674, 677 n.2 (11th Cir. 1985); *See, Pollgreen v. Morris,* 770 F.2d 1536, 1546 (11th Cir. 1985).

In *Louisiana Environmental Society v. Coleman,* 537 F.2d 79 (5th Cir. 1976), the court affirmed a number of highway-environmental issues but remanded the Section 4(f) determination for further fact-finding by the Secretary. On remand, the agency conducted additional fact-finding and issued a new Section 4(f) determination,

which was then submitted by the government in the original civil case with a motion for an order to show cause why judgment should not be entered. The district court proceeded to rule on the Section 4(f) issue (*Louisiana Environmental Society v. Brinegar,* 513 F. Supp. 179, 181 [W.D. La. 1981]), which ruling was appealed. *Louisiana Environmental Society v. Dole,* 707 F.2d 116 (5th Cir. 1983) (*LES II*). The Fifth Circuit proceeded to rule on the Section 4(f) determination that had been rendered on remand and affirmed the same. 707 F.2d 119-23.

The decisions in *Pollgreen* and *Taylor, supra,* are consistent with *LES II* and with the weight of authority in other highway-environmental cases where EIS or Section 4(f) issues have been remanded to the Secretary. *See, e.g., Fayetteville Area Chamber of Commerce v. Volpe,* 463 F.2d 402 (4th Cir. 1972), *on remand,* 386 F. Supp. 572 (E.D.N.C. 1974), *aff'd* 515 F.2d 1021 (4th Cir. 1975), *cert. denied sub nom. Interstate 95 Committee v. Coleman,* 432 U.S. 912 (1975); *Stop H-3 Association v. Coleman,* 533 F.2d 434 (9th Cir. 1976); *Harrisburg Coalition Against Ruining the Environment v. Volpe,* 381 F. Supp. 893 (M.D. Pa. 1974).

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPLE THAT A VOLUNTARY DISMISSAL IS NOT PROPER WHEN PREJUDICE RESULTS TO THE OPPOSING PARTY.

To begin a look at this question it is helpful to grasp the context in which Petitioners filed their Conditional Motion for Voluntary Dismissal. As early as May 16,

1986, all parties understood that this case was active. (R11). On June 6, 1986, the Federal Highway Administration filed its Motion for Summary Judgment. (R4-52). Not until July 18, 1986, after responding to the Federal Motion for Summary Judgment (R5-54), did Petitioners file their Conditional Motion for Voluntary Dismissal. (R5-56). Petitioners' Motion was denied (*Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 650 F.Supp. 1368, 1372 [N.D. Ga. 1986]) and the question before the Eleventh Circuit was whether the district court abused its discretion in denying the voluntary dismissal.

In finding no abuse of discretion the Eleventh Circuit relied upon *Litman v. Massachusetts Mutual Life Insurance Co.,* 825 F.2d 1506 (11th Cir. 1987) (en banc). After remand for further proceedings, the right to those new proceedings belongs to neither party individually, but rather to both. 825 F.2d at 1514. To have allowed voluntary dismissal would have effectively rendered a nullity the Eleventh Circuit's 1985 decision affirming most of the district court's order and remanding the case to the Secretary for further proceedings on one limited issue.

Immediately the prejudice becomes clear. Petitioners would not consider a dismissal with prejudice as to any part of this case. (R12-47-48). There had been a four-day trial. The Eleventh Circuit had already affirmed the district court's finding against Petitioners on all of the Environmental Impact Statements issues raised in this case. *Druid Hills Civil Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 708-13 (11th Cir. 1985). Additionally, some of the United States Secretary of Trans-

portation's findings on the Section 4(f) issues had been affirmed. 772 F.2d at 715. Those issues required finality, but Petitioners' stated desire was to resurrect them in another forum. (R12-40-43).

The only question before the district court on remand involved a decision of the United States Secretary of Transportation. 777 F.2d at 718. Yet, Petitioners' desire was to voluntarily dismiss and litigate in state court, where the United States cannot involuntarily be made a party. As the district court correctly noted: "The State Court doesn't have any right to adjudicate whether or not the Secretary of Transportation has properly discharged her duties." (R12-42 - R12-43). The Georgia Supreme Court has stated that the Georgia courts will not entertain issues regarding decisions of the United States Secretary of Transportation which are prerequisite to the appropriation of federal money to the State. *Morningside-Lenox Park Association, Inc. v. State Highway Department*, 224 Ga. 344, 346 (1968).

The cases relied upon by Petitioners do not provide a grounds for granting certiorari in this case. Only one involves an attempt to dismiss after remand; in the remainder the motion for voluntary dismissal came before trial and any appeal. *See, Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143 (9th Cir. 1982); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46 (1st Cir. 1981); *Hoffmann v. Alside, Inc.*, 596 F.2d 822 (8th Cir. 1979); *LaCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031 (5th Cir. 1974); *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967); *see, La-Tex Supply Co. v. Fruehauf Corp.*, 444 F.2d 1366 (5th Cir. 1971), *cert. den.*

404 U.S. 942 (1971) (not abuse or discretion to deny voluntary dismissal during the course of trial).

The sole exception, *Davis v. USX Corp.*, 819 F.2d 1270 (4th Cir. 1987), involved an appeal from a summary judgment. To make the order final and appealable the plaintiff dismissed her Title VII claims, leaving only common law tort claims based upon diversity of citizenship. *Davis v. United States Steel Corp,* 779 F.2d 209, 211 (4th Cir. 1985). After reversal on appeal, with only pendent state claims which could be tried in a state court remaining, plaintiff sought to voluntarily dismiss. In the case at bar the only remaining issue, the action of the United States Secretary of Transportation, *cannot* be tried in a state court.

The decision appealed from shows that the district court did not abuse its discretion in denying Petitioners' voluntary dismissal. *Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987). The only thing Petitioners have shown in their application is that the threat of a second lawsuit is insufficient grounds for denying a voluntary dismissal. The district court agreed, but found additional factors of prejudice. 650 F. Supp. at 1372. Those factors remain unchallenged here.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PROCEDURAL PRINCIPAL THAT AN UNOPPOSED MOTION FOR SUMMARY JUDGMENT WILL BE GRANTED.

The second part of Petitioner's argument on this point, that they were given no opportunity to respond to

the merits of the Federal Highway Administration's Motion for Summary Judgment, requires a denial of the record. As late as thirty days before a hearing on the federal Motion for Summary Judgment, the district court issued an order inviting Petitioners to respond substantively to the Motion. App. A; R5-68-2; 833 F.2d at 1550. They elected not to do so.

Nor did the district court abuse its discretion in denying discovery. After the Federal Highway Administration filed its Motion for Summary Judgment, it was incumbent upon Petitioners to respond substantively. They elected to respond otherwise.

After the Motion was filed on June 6, 1986 (R4-52), Petitioners first gained an extension of time to respond. (R5-53). They subsequently filed no less than five responses (R5-54, 56, 57, 60 and 61); however, in none of these did they respond substantively to the merits of the Federal Motion. Rather, they chose to respond only to procedural and jurisdictional questions. *See, e.g.*, R5-54-1-26. On September 16, 1986, the district court invited a substantive response to the Motion (App. A), but no subsequent response was filed. Even the proposed brief attached to Petitioners' August 20, 1986 pleading (R5-61-6-16) provided no substantive response to the Federal Motion.

After the Federal Highway Administration filed its Statement of Material Facts with the Motion for Summary Judgment, Petitioners did file a response thereto. (R5-54). That response was either to admit the facts or feign ignorance. (R5-54-27-30). This is an unacceptable response to a Motion for Summary Judgment. N.D. Ga. Local Rule 220-5(b)(2).

Local Rule 220-5(b)(2) states:

> "The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of F.R. Civ.P. 56(f)."

Federal Rules of Civil Procedure, Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot *for reasons stated* present by affidavit facts essential to justify his opposition, the court may . . . [inter alia] permit . . . depositions to be taken or discovery to be had . . . ." (Emphasis and matter in brackets added).

Petitioners alleged Rule 56(f) affidavit (R5-54 Ex. B) failed for two reasons: it was not an affidavit of a party, but of counsel; it stated no reasons why substantive opposition to the Motion could not be made. The affidavit of counsel stated only that he had not done discovery because he did not believe any matter was properly before the court and that before any decision was made on the merits ". . . discovery would be necessary." R5-54-Ex.B, ¶ 5.

The question here is not the alleged "arbitrary power" of the district court, or the Eleventh Circuit's improper application of the correct standard of review, but the Petitioners' failure to respond to the Motion for Summary Judgment. Because Petitioners made no attempt to substantively reply to the Motion, that Motion was in fact unopposed. *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869 (5th Cir. 1978); *Oglesby v. Terminal Transport Co., Inc.*, 543 F.2 1111 (5th Cir. 1976); *See, Druid Hills Civic Association, Inc. v. Federal Highway Administration,*

650 F. Supp. 1368, 1373 n. 1 (N.D. Ga. 1986). Failure to comply with Local Rule 220, formerly Local Rule 90, is proper grounds for granting a summary judgment as unopposed. *Simon v. Kroger Company*, 743 F.2d 1544 (11th Cir. 1984), *cert. den.* 471 U.S. 1075 (1985). Having made an election not to address the merits of the Motion, Petitioners now complain that they were given no opportunity to respond on the merits. The record itself belies their position and substantiates that the district court did not abuse its discretion in refusing to allow discovery.

IV. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW ONLY OF THE APPLICATION OF THE SETTLED PRINCIPLE THAT ATTORNEY'S FEES ARE AWARDED ONLY TO PREVAILING PARTIES.

A. PETITIONERS ARE NOT A PREVAILING PARTY IN THIS ACTION.

It has been clear from the outset of this litigation that Petitioners' only goal was an injunction to stop construction of the Presidential Parkway. Contrary to their contention that their entire prayer for relief was a request to set aside approval of the project, the primary prayer was for an order to

> "... temporarily restrain, and preliminarily and permantly enjoin Defendants from taking any actions toward the construction of the [Presidential Parkway]." R1-1-21.

Everything else was subordinated to that goal. But no court has ever issued an injunction in this case. Contrary to Petitioners' assertion, work on the Presidential Parkway has never stopped because of this case.

Attorney's fees may be recovered only by a prevailing party. 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The term "prevailing party" is a flexible one that is dependent on the relief sought and actually obtained in a particular case. *B & J Music, Inc. v. McAuliffe*, 719 F.2d 1536, 1538 (11th Cir. 1983). While the party need not be successful in each and every claim asserted, it must achieve significant relief to which it was entitled. *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982).

The mere fact that a party gets what it is after does not make it a prevailing party under 42 U.S.C. § 1988, unless it prevails on a significant legal issue to achieve the *primary relief sought*. *B & J Music, Inc. v. McAuliffe*, 719 F.2d 1536, 1539 (11th Cir. 1983); *Robinson v. Kimbrough*, 652 F.2d 458, 478 (5th Cir. 1981); *Iranian Students Association v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981); *cf. Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981). Nor is a party considered to be prevailing if it obtains mere procedural victories. Congress' intent was to permit interim awards of attorney's fees only when a party has prevailed *on the merits* of some of its claims. *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980); *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982).

An examination of the relief sought and actually obtained *(B & J Music, Inc. v. McAuliffe, supra)* in this case shows that Petitioners were not a prevailing party for purposes of 42 U.S.C. § 1988. The district court correctly analyzed Petitioners' case, and the relief sought, under the precedent of this Court. *Druid Hills Civic Association, Inc. v. Federal Highway Administration*, 650 F. Supp. 1368, 1377 (N.D. Ga. 1986).

Neither the district court nor the Eleventh Circuit granted Petitioners any of the substantive relief sought, *i.e.*, enjoin the project and have the Secretary's decision declared illegal. (R1-1-21). The remand was at most a procedural victory and not a victory on the merits of any of Petitioners' claims. *See, Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980); *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982); for cases dealing specifically with the denial of attorney's fees when a case has been only remanded, *see, e.g., Brown v. Secretary of Health and Human Services*, 747 F.2d 878 (3rd Cir. 1984); *Kitchen Fresh, Inc. v. National Labor Relations Board*, 729 F.2d 1513 (6th Cir. 1984); *McGill v. Secretary of Health and Human Services*, 712 F.2d 28 (2nd Cir. 1983), *cert. den.* 465 U.S. 1068 (1984); *National Labor Relations Board v. Doral Building Services, Inc.*, 680 F.2d 647 (9th Cir. 1982).

It is the failure of Petitioners to achieve any substantive relief whatsoever during four years of litigation which distinguishes this case from every case cited by them on the attorney's fees issue. In most of the cited cases relief was obtained in the form of an injunction. *Sierra Club v. Army Corps of Engineers*, 776 F.2d 383, 387 (2nd Cir. 1985) (court also found "willful derogation of law"); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1242 (9th Cir. 1984); *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 588 (3rd Cir. 1984); *Environmental Defense Fund, Inc. v. Watt*, 722 F.2d 1081, 1084 (2nd Cir. 1983) (settled under threat of injunction); *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1477 (9th Cir. 1983). Even the case relied upon most heavily by Petitioners is one in which the plaintiffs

were granted a writ of mandamus. *Guerrero v. Marsh,* 819 F.2d 238, 242 (9th Cir. 1987).

Even the cases cited by Petitioners for the proposition that a procedural victory entitles a party to attorney's fees do not stand for that proposition. They stand for the proposition that securing minor substantive relief may be sufficient to have a party considered "prevailing." *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897 (3rd Cir. 1985) (relief sought through litigation precipitated relief through legislation and regulation); *Fast v. School District of City of Ladue,* 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc) (ordered procedures to secure plaintiff's constitutional rights in a termination proceeding); *Bagby v. Beal,* 606 F.2d 411, 413 (3rd Cir. 1979) (ordered specific termination hearing procedures to secure plaintiffs' constitutional rights).

B. PETITIONERS ARE NOT A PREVAILING PARTY AGAINST THE STATE RESPONDENTS IN THIS ACTION.

Even if it were determined that Petitioners were a "prevailing party" generally in this case, which the State Respondents submit they are not, the inquiry does not end. Regardless of whether Petitioners are a prevailing party as against the Federal Respondents, the orders below are correct to the extent they determine Petitioners are not a prevailing party as against the State Respondents. Section 1988 (42 U.S.C. § 1988) does not create attorney's fees liability where liability on the merits is non-existent. *Kentucky v. Graham,* 473 U.S. 159 (1985).

Section 1988 does not specifically define the parties who must bear the attorney's fees. However, it logically

follows that the party legally responsible for relief on the merits is the party who should bear attorney fee liability. 473 U.S. at 164. In the present case no injunction has been issued against the State Respondents; no decision of the State Respondents has been found to be erroneous. All the Environmental Impact Statement issues were resolved in the State Respondents' favor. *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 708-13 (11th Cir. 1985).

The case was remanded solely on the issue of a decision of Federal Respondent, U.S. Secretary of Transportation.

> "[T]he case must be remanded to the Secretary. . . . [W]e are mindful of the tremendous task confronting the Secretary in resolving these difficult issues." 772 F.2d at 718.

On remand it was the Secretary who was responsible for relief. Petitioners did not prevail against the State Respondents and 42 U.S.C. § 1988 does not authorize a fee award against them. *Kentucky v. Graham,* 473 U.S. 159, 165 (1985).

———o———

CONCLUSION

Because Petitioners did not substantively oppose the Federal Highway Administration's Motion for Summary Judgment, Petitioners seek review only of the application of settled procedural principles without conflict among the circuits. All were properly applied in this case. For the foregoing reasons it is respectfully submitted that Petitioners' Application for Writ of Certiorari should be DENIED.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant Attorney General

ROLAND F. MATSON
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ROLAND F. MATSON
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3360

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DRUID HILLS CIVIC ASOCIATION, INC., et al.	)	
vs.	)	CIVIL NO. C84-1931A
FEDERAL HIGHWAY ADMINISTRATION, et al.	)	

ORDER

Presently before the court are plaintiffs' motion for attorneys' fees, federal defendants' motion for summary judgment, plaintiffs' conditional motion for voluntary dismissal as to the subject matter of federal defendants' motion for summary judgment, plaintiffs' motion to allow filing of amendment to and clarification of plaintiffs' brief in support of plaintiffs' application for fees, costs, and expenses, and plaintiffs' motion to allow plaintiffs to file reply briefs in opposition to federal defendants' motion for summary judgment.

After careful review of the record, the court has determined that a hearing on the federal defendants' motion for summary judgment would be beneficial. The parties are directed to appear on October 17, 1986, at 9:30 a.m. at the United States Courthouse, 75 Spring Street, S.W., Courtroom 1906, Atlanta, Georgia. This hearing date is contingent on the court's completing a criminal trial in the Gainesville Division set to begin on September 29, 1986. Attorneys for all parties should call Jerry Evans, Courtroom Deputy Clerk, one week prior to the

hearing to confirm this date. At the hearing all parties should be prepared to discuss the merits of federal defendants' motion for summary judgment and all issues related to that motion, including plaintiffs' conditional request for interlocutory appeal and additional discovery time.

The court will allow plaintiffs' motion to file a reply brief in opposition to federal defendants' motion for summary judgment. L.R. 220-1(b)(2) (N.D. Ga.). The court grants plaintiffs until September 22, 1986 to file their reply brief.

The court will not decide the other motions until after the hearing on federal defendants' motion for summary judgment. Although plaintiffs' motion for attorneys' fees has been pending before the court since May 20, 1986, the court is of the opinion that the motion may be affected in some manner by future developments in the defendants' motion for summary judgment.

Accordingly, plaintiffs' motion to file reply briefs in opposition to federal defendants' motion for summary judgment is granted, and a hearing is set for October 17, 1986, at 9:30 a.m. on federal defendants' motion for summary judgment.

IT IS SO ORDERED this 16th day of September, 1986.

/s/ William C. O'Kelley

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX B

COURT RULES INVOLVED

1. Federal Rule of Civil Procedure 56(f)

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

2. Northern District of Georgia Local Rule 220-5(b)(2)

> The respondent to a motion for summary judgment shall attach to his response a separate and concise statement of material facts, numbered separately, to which he contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in his statement shall be deemed to have been admitted. The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of F.R. Civ.P. 56(f).

(3)

No. 87-1891

Supreme Court, U.S.
FILED
JUL 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

DRUID HILLS CIVIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

THE FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
MARTIN W. MATZEN
MARIA A. IIZUKA
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court, after remanding a case to the Secretary of Transportation for further findings, retained jurisdiction to review the Secretary's decision on remand.

2. Whether the district court abused its discretion in denying petitioners' motion to dismiss their lawsuit voluntarily under Fed. R. Civ. P. 41(a)(2).

3. Whether the district court abused its discretion in denying petitioners discovery to supplement an administrative record.

4. Whether petitioners were prevailing parties entitled to an award of attorneys' fees because they obtained a remand to the agency for further findings, even though they ultimately failed to persuade the agency or the court to reverse the agency's original decision on the merits.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1891

DRUID HILLS CIVIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

THE FEDERAL HIGHWAY ADMINISTRATION, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 833 F.2d 1545. The opinion of the district court (Pet. App. A13-A31) is reported at 650 F. Supp. 1368.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1987. A petition for rehearing was denied on February 19, 1988 (Pet. App. A82-A83). The petition for a writ of certiorari was filed on May 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 21, 1984, the Secretary of Transportation (the Secretary), through the Federal Highway Administration, authorized the use of federal funds for the construction of the Presidential Parkway in Atlanta, Georgia. The Parkway was to run between downtown Atlanta and a section of the city known as Druid Hills. The Secretary prepared an environmental impact statement pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.* Further, because the road was to be built through both park lands and an historic area, the Secretary analyzed alternative routes as required under Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 (recodification of former 49 U.S.C. 1653(f)). The Secretary concluded that there was "no feasible and prudent alternative to the use of such land" and that the proposal included "all possible planning to minimize harm" to historic and park lands.

2. Two separate lawsuits, subsequently consolidated, were filed against the Federal Highway Administration challenging the project. The district court, declining to enjoin construction of the Presidential Parkway, held (Pet. App. A78) that the Secretary's decision was not arbitrary, capricious, or an abuse of discretion. The court of appeals affirmed in part and reversed in part (*id.* at A32-A55). The court affirmed the district court's holdings with regard to compliance with NEPA and with Section 4(f)(1) of the Department of Transportation Act of 1966. The court of appeals held, however, that the Secretary had not made "the requisite findings necessary for an informed comparison of the relative harms anticipated by the construction of the various routes" (Pet. App. A51) as required under Section 4(f)(2), which imposes a duty on the Secretary "to utilize a balancing process that totals the

harm caused by each alternative so that an option can be selected which does the least harm" (Pet. App. A50). The court of appeals determined that "the case must be remanded to the Secretary for adequate findings of the impact on 4(f) properties" (*id.* at A54), and remanded to the district court for proceedings consistent with the court's opinion (*id.* at A55).

3. The Secretary, after conducting further studies, found that the original route chosen, when measured against alternative routes, produced the least harm to park and historic lands. After a new Section 4(f) statement was issued, the Secretary moved for summary judgment. Petitioners opposed the granting of summary judgment on the ground that the district court was without jurisdiction after remand. Petitioners also moved the district court for voluntary dismissal of the case and, should the court deny that motion, asked the court to certify the question for an immediate appeal. Petitioners also moved for an award of attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A).

The district court granted the government's motion for summary judgment, holding that the Secretary had acted within the scope of her authority (Pet. App. A21-A23); that all relevant factors had been considered in the decision to use the original route selected rather than another alternative using Section 4(f) lands (Pet. App. A23-A26); and that the Secretary had complied with all procedural requirements (*id.* at A27-A28).

In addressing petitioners' motion for voluntary dismissal or, alternatively, certification of the question for immediate appeal, the district court observed that dismissal at that stage of the proceedings would prejudice the defendants (Pet. App. A17). The district court also held that the controlling precedent of its circuit supported the view that

it had retained jurisdiction since the remand to the agency had not been a final judgment (*id.* at A15-A18).

The district court denied petitioners' motion for additional discovery (Pet. App. A18-A19), stating that discovery would not aid the parties in determining the adequacy of the administrative record to support the Secretary's new findings.

In denying petitioners' fee application, the district court found that petitioners "did not achieve significant success on any of the issues or obtain any of the relief they sought," citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (Pet. App. A30).

4. The court of appeals affirmed, rejecting petitioners' argument that the district court's entry of judgment after the first appeal "constituted a final judgment under the separate document rule of Federal Rule of Civil Procedure 58" (Pet. App. A7). Citing its earlier decision in *Taylor* v. *Heckler*, 778 F.2d 674 (11th Cir. 1985), the court of appeals held that the remand order had not divested the district court of jurisdiction (Pet. App. A6).

The court of appeals also affirmed the district court's denial of petitioners' motion for voluntary dismissal of the complaint since the Secretary would have been deprived of the opportunity for further proceedings that the remand order had conferred on both parties (Pet. App. A10). Having submitted themselves to the authority of the federal court system, petitioners could not, the court of appeals held, unilaterally withdraw from a lawsuit at a particular procedural stage in the litigation on the ground that petitioners were now satisfied with the result (*id.* at A8).

The court of appeals also rejected petitioners' assertion that the district court had abused its discretion in denying their motion for further discovery in order to oppose the

Secretary's summary judgment motion (Pet. App. A10-A11). The court of appeals noted that petitioners had failed to take opportunities available to them either to file a brief responding substantively to the Secretary's motion or to conduct extensive discovery at the time the suit had been filed (*id.* at A11).

Finally, in affirming the district court's denial of petitioners' application for attorneys' fees, the court of appeals held that petitioners had "not ultimately achieved the primary relief sought" (Pet. App. A12).

ARGUMENT

1. Petitioners first contend (Pet. 6-11) that their lawsuit terminated and the district court lost jurisdiction when the case was remanded to the Secretary for further findings in 1985. Thus, they argue that the district court could not address the adequacy of the Secretary's findings on remand unless some adversary party brought a new lawsuit to challenge those findings. Petitioners' argument, although couched in constitutional "case or controversy" terms, rests at bottom on a misunderstanding of the prior mandate of the court of appeals and judgment of the district court.

It was petitioners, not respondents, who invoked the jurisdiction of the district court in the first place. Once a live controversy was placed before the court, it retained jurisdiction until it entered a dispositive order. Although petitioners have contended that the district court's judgment remanding the case to the Secretary was such a dispositive order, the settled law in the Eleventh Circuit is to the contrary (*Taylor* v. *Heckler*, 778 F.2d at 677 n.2, quoted at Pet. App. A6):

> Because this circuit considers a remand order an interlocutory order, it follows by operation of law that

> the district court retains jurisdiction of the case until the proceedings on remand have been concluded. To terminate its jurisdiction, the district court must subsequently enter a dispositive order of some sort * * *.

Thus, it simply is not the case that the lawsuit initiated by petitioners terminated in 1985, nor did the findings of the Secretary on remand amount to a new administrative decision that could only be challenged in a new lawsuit. Rather, the Secretary made those findings pursuant to an interlocutory order that, by operation of law, preserved the district court's jurisdiction to act in response to the Secretary's action.[1]

The principle that there must be an actual case or controversy, in the constitutional sense, at all stages of the proceedings (see Pet. 10, citing *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974)) does not support petitioners' contention that the district court lost its jurisdiction once petitioners elected to give up on any further substantive challenge to the Secretary's decision. The principle that petitioners invoke precludes courts from exercising jurisdiction over

---

[1] The Eleventh Circuit rule that the district court retains jurisdiction when it remands a case to an administrative agency, and that the remand order is therefore interlocutory rather than final, accords with numerous decisions of other courts of appeals holding such remand orders to be interlocutory rather than final for purposes of determining appealability. See, *e.g.*, *Mall Properties, Inc.* v. *Marsh*, 841 F.2d 440, 441 (1st Cir. 1988) ("The litigation has not ended. It simply has gone to another forum and may well return again."); *Cabot Corp.* v. *United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986); *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 404 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc); *United Steelworkers, Local 1913* v. *Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981); *Fayetteville Area Chamber of Commerce* v. *Volpe*, 463 F.2d 402, 405-406 (4th Cir. 1972).

cases such as *DeFunis* that have become moot because the plaintiff will neither benefit from a favorable determination of the legal issues nor suffer from an unfavorable determination. See also, *e.g.*, *Honig* v. *Doe*, No. 86-728 (Jan. 20, 1988), slip op. 10-11. It does not extend to cases such as this one in which the plaintiff, although it will be injured just as much by the defendant's actions as it would have been at the start of the lawsuit, merely decides that it no longer wishes to have a judgment entered in the lawsuit. If the *DeFunis* principle extended that far, then courts would be powerless ever to deny motions for voluntary dismissal, and Fed. R. Civ. P. 41(a)(2), conditioning the grant of such motions on leave of court, would be meaningless.

Because the district court retained jurisdiction when it remanded this case to the Secretary, it was entirely proper for respondents to move for summary judgment following the Secretary's decision on remand, and the district court correctly treated that motion as a proper pleading in a pending case. Respondents' determination not to pursue the case further did not deprive the court of jurisdiction to conclude the lawsuit by entering a final judgment.

2. Petitioners next contend (Pet. 11-14) that the district court should have granted their motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). Petitioners' claim that they had a right to voluntary dismissal, however, seriously misconceives the nature of Rule 41(a)(2). Rule 41(a)(2) is written in prohibitory terms: "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Contrary to petitioners' position (Pet. 12) that "[t]he district court is not empowered to simply weigh 'the equities' in deciding a motion to dismiss under Rule 41(a)(2)," it is hornbook law (5 J. Moore, J.

Lucas, & J. Wicker, *Moore's Federal Practice* ¶ 41.05[1], at 41-47 to 41-50 (2d ed. 1987) (footnotes omitted)) that

> [u]nder Rule 41(a)(2) the court has the power to weigh the equities and do justice in each case. After plaintiff has lost his power to effect a voluntary dismissal under Rule 41(a)(1), dismissal at his instance may only be had under Rule 41(a)(2) upon order of the court, and upon such terms as the court deems proper. The granting of the motion is within the court's discretion, and not a matter of right; and therefore the trial court's ruling will not be overturned on appeal absent a showing of an abuse of discretion.

In light of the broad discretion granted trial courts by Rule 41(a)(2), it has been held sufficient to support the denial of a motion for voluntary dismissal that "the motion was made after defendant had moved for summary judgment and in order * * * merely to avoid summary judgment" (5 J. Moore, J. Lucas, & J. Wicker, *supra,* at 41-54 to 41-55 (footnote omitted)) or "the motion was made after the case was ready for final disposition by summary judgment" (*id.* at 41-56 (footnote omitted)). Recently, in *Paulucci* v. *City of Duluth,* 826 F.2d 780 (8th Cir. 1987), the court of appeals listed factors that a district court could properly consider in denying a motion for voluntary dismissal, including three factors that were present here: the filing of a motion for summary judgment by the defendant; time and expense involved in preparing for trial proceedings; and "the absence of a justification for the proposed dismissal" (*id.* at 783).

Petitioners can show no abuse of discretion in the denial of their motion in this case. Respondents had gone to great effort to make the case ready for final disposition by the trial court, and it would have been "plain legal prejudice" (Pet. App. A10) to respondents at the time of respondents'

motion to deny them a judicial resolution of the allegation that their decision to approve the Presidential Parkway was not in compliance with Section 4(f) of the Department of Transportation Act of 1966. Moreover, it is not clear what equities petitioners can assert in favor of a grant of their motion for voluntary dismissal: unless petitioners plan to bring a second challenge under Section 4(f) to the decision to approve the Parkway—an intention that they disclaim (Pet. 8, 9, 10)—it makes no difference that the district court decided the merits of their challenge (and thus dismissed with prejudice) rather than dismissing without prejudice, and petitioners thus appear to be in the same position they would have occupied if their motion had been granted. As the district court said (Pet. App. A17): "This case has been in litigation for more than two years. The defendants have spent a great deal of time and money in preparing the new findings. Accordingly, the equities in this case fall in favor of denying plaintiffs' motion for voluntary dismissal."

The cases that petitioners cite are not remotely in conflict with the decision below. Most of the cases simply hold that district courts did not abuse their discretion in particular circumstances by granting particular motions for voluntary dismissal. See *Hamilton* v. *Firestone Tire & Rubber Co.*, 679 F.2d 143 (9th Cir. 1982); *Puerto Rico Maritime Shipping Auth.* v. *Leith*, 668 F.2d 46 (1st Cir. 1981); *Hoffman* v. *Alside, Inc.*, 596 F.2d 822 (8th Cir. 1979). To say that a grant of the motion was within the bounds of the district court's discretion is not to say that a denial would have exceeded the bounds of discretion, even on the same facts. In any event, the facts of those cases are entirely dissimilar to the facts here. And in *Davis* v. *USX Corp.*, 819 F.2d 1270 (4th Cir. 1987), although the court did reverse the denial of a motion for voluntary dismissal,

it did so not on any grounds applicable here but rather on the ground that the condition that the district court placed on voluntary dismissal resulted from a misunderstanding of the prior decision of the court of appeals in the same case. There simply is no decision that conflicts with the holding below that the district court acted within the limits of its discretion by denying voluntary dismissal in the circumstances of this case.[2]

3. Petitioners also assert (Pet. 14-17) that the district court abused its discretion by denying petitioners an opportunity for discovery after the post-remand findings of the Federal Highway Administration and further denying them an opportunity to respond to the federal defendants' motion for summary judgment. The district court, however, determined (Pet. App. A18-A19) that additional discovery would not have assisted the court and the parties in addressing the question whether the administrative record was adequate to support the findings made by the federal defendants. The district court noted (*id.* at A19 n.1) that, although petitioners had filed a response to the government's motion for summary judgment, the pleading "did not respond substantively to the merits of the motion" (*id.* at A11). The district court granted petitioners additional time to file a brief addressing the merits of the government's motion, but petitioners did not take advantage of the grant of additional time (*ibid.*):

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[2] Petitioners cite several decisions of the former Fifth Circuit (Pet. 12-13) in an effort to support their argument, but none of those cases resembles this one. We do not elaborate on the distinctions because under *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), those decisions are binding precedent in the Eleventh Circuit, and petitioners' claim of conflict thus amounts to nothing more than a claim of intracircuit conflict, which would be for the Eleventh Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

> [Petitioners'] apparent reluctance to make any serious substantive challenge to the motion, combined with the fact that it had the opportunity to conduct extensive discovery at the time of its original challenge to the approval of the Presidential Parkway, support the district court's determination that further discovery would not lead to the creation of a material question of fact. Therefore, the district court did not abuse its discretion in denying [petitioners'] motion for additional discovery.

4. Petitioners finally assert (Pet. 17-21) that the district court erred in denying their application for attorneys' fees on the ground that petitioners were not prevailing parties. As the district court observed (Pet. App. A29), however, the sole relief that petitioners obtained was "delaying progress on the Parkway pending the defendants' new 4(f) findings." This stands in contrast to the relief sought in the complaint: enjoining the defendants from constructing the Parkway and setting aside the approval of the project (*ibid.*). Thus, as the court of appeals stated (*id.* at A11-A12), "[w]e read Druid Hills' complaint as seeking to prevent the construction of the Presidential Parkway. * * * Since we have not overturned the district court's granting of FHWA's motion for summary judgment, Druid Hills has not ultimately achieved the primary relief sought and is therefore not entitled to attorney's fees."

The decision below is in accord with the rule, widely accepted in the courts of appeals, that a plaintiff is not a prevailing party merely because it persuades a court to remand a matter to an administrative agency; rather, it is only at the conclusion of the litigation, including any decision by the agency on remand and any further judicial review, that it can be determined whether the plaintiff

succeeded in achieving the end it sought through litigation. As the Third Circuit stated in the leading case of *Brown* v. *Secretary of Health & Human Services,* 747 F.2d 878, 883 (1984):

> When a court vacates an administrative decision and remands the matter for reconsideration, the successful party generally should not recover attorney's fees at that particular time since the claimant's rights and liabilities and those of the government have not yet been determined.

Accord *Singleton* v. *Bowen,* 841 F.2d 710, 711-712 (7th Cir. 1988); *Paulson* v. *Bowen,* 836 F.2d 1249, 1252 (9th Cir. 1988); *Swedberg* v. *Bowen,* 804 F.2d 432, 434 (8th Cir. 1986); *Swenson* v. *Heckler,* 801 F.2d 1079, 1080 (9th Cir. 1984); *Cook* v. *Heckler,* 751 F.2d 240, 241 (8th Cir. 1984); *Austin* v. *Department of Commerce,* 742 F.2d 1417, 1420-1421 (Fed. Cir. 1984); *McGill* v. *Secretary of Health & Human Services,* 712 F.2d 28, 30-32 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); see also *Escobar Ruiz* v. *INS,* 787 F.2d 1294 (9th Cir. 1986); *NLRB* v. *Doral Building Services, Inc.,* 680 F.2d 647 (9th Cir. 1982).

The D.C. Circuit recently followed the *Brown* principle in *National Coalition Against the Misuse of Pesticides* v. *Thomas,* 828 F.2d 42 (1987). In that case, the petitioner had succeeded in persuading the court to reject as arbitrary and capricious an Environmental Protection Agency (EPA) decision to fix a certain pesticide tolerance, but EPA had adhered to its original decision after further proceedings, and a renewed challenge to EPA's decision had been unsuccessful. The court denied attorneys' fees, observing that, "[s]ince petitioners failed to achieve what they set out to accomplish, it would severely strain the language of the statute to describe them as 'prevailing' "

(828 F.2d at 44). In response to the petitioners' argument that they were prevailing parties at least in part because of their successful challenge to the original decision, the court responded that "[i]t is well settled that procedural victories of this sort, including those in which the fees claimants obtain a favorable declaration of the law, do not suffice to qualify claimants as 'prevailing parties' " (*ibid.*). As the D.C. Circuit noted, that rule, in addition to being established by prior cases in the courts of appeals, is supported by this Court's recent decision in *Hewitt* v. *Helms,* No. 85-1630 (June 19, 1987). Here, as in *Hewitt* v. *Helms,* a remand was ordered at the behest of the plaintiff (in that case to the district court rather than to an agency), but ultimately the plaintiff failed to secure the redress sought "*which [would affect] the behavior of the defendant towards the plaintiff*" (*Hewitt* v. *Helms,* slip op. 5 (emphasis in original)). See also *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980).

The cases on which petitioners rely do not stand for a contrary principle. In *Citizens Council* v. *Brinegar,* 741 F.2d 584 (3d Cir. 1984), the government simply neglected to raise the question whether the plaintiffs were prevailing parties. The case contains no discussion of the factors that bear on a determination of prevailing-party status, and it does not stand as a precedent on that question, particularly in light of the same court's later decision in *Brown.* In *Sierra Club* v. *United States Army Corps of Engineers,* 776 F.2d 383 (2d Cir. 1985), cert. denied, 475 U.S. 1084 (1986), the plaintiffs achieved far more success than just a remand to the agency; the project that they had challenged was abandoned.[3] In *Save Our Ecosystems* v. *Clark,* 747

[3]See 776 F.2d at 386 (referring to 'Westway', the once-proposed replacement for a portion of the West Side Highway in lower Manhattan"); see also *New York Leaders Give Up Westway and Seek Trade-in,* N.Y. Times, Sept. 20, 1985, at A1, col. 1.

F.2d 1240 (9th Cir. 1984), *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark,* 720 F.2d 1475 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984), and *Environmental Defense Fund, Inc.* v. *Watt,* 554 F. Supp. 36 (E.D.N.Y. 1982), aff'd, 722 F.2d 1081 (2d Cir. 1983), the plaintiffs succeeded in bringing about a cessation of the spraying of certain chemicals, and none of the three decisions involved the ordering of a remand to the agency for further proceedings. Nor did any of the three opinions indicate any expectation that spraying would resume following further agency proceedings.[4] And, significantly, in none of the three cases was prevailing-party status a contested issue.

In *Fast* v. *School District,* 728 F.2d 1030 (8th Cir. 1984) (en banc), and *Bagby* v. *Beal,* 606 F.2d 411 (3d Cir. 1979), the plaintiffs prevailed on procedural due process claims and were granted hearings that otherwise would not have been provided to them. Although each plaintiff ultimately failed to overturn the underlying substantive action, the courts held that they were prevailing parties. The continuing authoritativeness of those decisions is questionable, in light of the holding and rationale of this Court's subsequent decision in *Hewitt* v. *Helms, supra.* Those cases are, in any event, distinguishable from typical administrative-law cases involving remands, such as the present one, in which the purpose of the remand is to require the agency to reexamine or provide further justification for its deci-

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[4] Although in some instances the agency eventually did resume spraying after preparing new environmental impact statements that met the courts' concerns, the government apparently did not urge, and there is no reason to believe that the courts considered, any possible argument that the ultimate failure of the plaintiffs to achieve a permanent cessation of the spraying meant that they were not prevailing parties.

sion, and not to vindicate an individual constitutional right of the plaintiff that is " 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions" (*Carey* v. *Piphus*, 435 U.S. 247, 266 (1978)).[5]

Likewise, the decision in *Lear Siegler, Inc., Energy Prods. Div.* v. *Lehman*, 842 F.2d 1102, 1115-1117 (9th Cir. 1988), rests on the proposition that the plaintiff's victory on a major issue concerning the constitutionality of an Act of Congress sufficed to make it a prevailing party, particularly because the plaintiff had "a long-term interest in * * * [government] compliance [with that Act] because it is likely to bid on government contracts in the future" (842 F.2d at 1116). Petitioners' temporary success in challenging the adequacy of one particular record supporting the particular highway project they opposed (which ultimately was approved) sets no such important precedent and vindicates no such long-term interest of petitioners. Finally, in *Guerrero* v. *Marsh*, 819 F.2d 238 (9th Cir. 1987), the court's reasoning is difficult to discern because the court addressed attorneys' fees only in a single conclusional sentence at the end of its opinion. At all events, the case is distinguishable from this case because it did not involve a remand to an agency that remained potentially free to adhere to its original decision; rather, the case involved a grant of a writ of mandamus to compel an agency to exercise jurisdiction over an application (for correction of military records) over which the agency had refused to exercise jurisdiction. The case cannot fairly be read to signal

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[5] Petitioners also cite (Pet. 20) *Institutionalized Juveniles* v. *Secretary of Public Welfare*, 758 F.2d 897, 911 n.25 (3d Cir. 1985), but we cannot discern any way in which that case, in which significant institutional reforms resulted from the litigation at issue, could be said to advance petitioners' position.

a retreat from the established principle in the Ninth Circuit that "securing a remand on an appeal of an administrative * * * decision is insufficient to qualify a claimant as a prevailing party under the EAJA" (*Swenson* v. *Heckler,* 801 F.2d at 1080)—particularly in light of the support that that principle has received from this Court's decision in *Hewitt* v. *Helms, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
MARTIN W. MATZEN
MARIA A. IIZUKA
Attorneys

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